

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 122.

J. N. BEAN, W. R. BAINBRIDGE, S. W. BENT, WALLACE
BENT, AND CORBETT BENNETT, PETITIONERS,

vs.

W. A. MORRIS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI FILED DECEMBER 29, 1909.
CERTIORARI AND RETURN FILED FEBRUARY 20, 1910.

(21,460.)



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1 In the Circuit Court of the United States, Ninth Circuit,
District of Montana.

WILLIAM A. MORRIS, Complainant,

vs.

J. N. BEAN et al., Defendants; THOMAS N. HOWELL, Intervener.

Order Extending Time to File Record.

Good cause being shown therefor, it is ordered that the time for filing the transcript on appeal herein with the clerk of the United States Circuit Court of Appeals, Ninth Circuit, be, and the same is hereby, extended until the 31st day of December, A. D. 1906.

Dated this 10th day of December, A. D. 1906.

WILLIAM H. HUNT, Judge.

[Endorsed:] No. 1423. United States Circuit Court of Appeals, for Ninth Circuit. Order Extending Time to File Record. Filed Dec. 13, 1906. F. D. Monckton, Clerk. Re-filed Jan. 16, 1907. F. D. Monckton, Clerk.

2 In the Circuit Court of the United States, Ninth Circuit,
District of Montana. In Equity.

WILLIAM A. MORRIS, Complainant,

vs.

J. N. BEAN et al., Defendants; T. N. HOWELL, Intervener.

Caption.

Be it remembered that on the 20th day of January, A. D. 1903, the complainant filed his bill of complaint herein, being in the words and figures following, to wit:

3 In the United States Circuit Court, Ninth Circuit, District
of Montana. In Equity.

WILLIAM A. MORRIS

vs.

J. N. BEAN, JOHN SADRING, L. O. DILTZ, ALLEN P. GRAHAM, William Eley, Curtis Beeler, Charles Ingram, W. R. Bainbridge, C. Runyan, William Sholtz, C. E. Steele, Bert Bent, Wallace Bent, John Rhodes, F. Banderof, O. S. Erickson, Tillman C. Graham, James Pauley, C. M. Brown, John Bowler, J. A. King, A. Holm, C. H. Young, Corbett Bennett, and Michael Wrote.

Bill of Complaint.

To the Honorable, the Judges of the Circuit Court of the United States of America, Ninth Circuit, District of Montana:

William A. Morris, your orator, complains of the defendants and says,

1. That he is now, and for fifteen years last past has been, a resident and citizen of the Territory and State of Wyoming.

4 2. That J. N. Bean, John Sadring, L. O. Diltz, Allen P. Graham, William Eley, Curtis Beeler, Charles Ingram, W. R. Bainbridge, C. Runyan, William Scholtz, C. E. Steele, Bert Bent, Wallace Bent, John Rhodes, F. Banderof, O. S. Erickson, Tillman C. Graham, James Pauley, C. M. Brown, John Bowler, J. A. King, A. Holm, C. H. Young, Corbett Bennett and Michael Wrote are, and at all the times hereinafter mentioned have been residents and citizens of the Territory and State of Montana.

3. That the amount involved in this action exceeds the sum of two thousand dollars, exclusive of interests and costs.

4. That for the period of fifteen years last past, William A. Morris, your orator, has had and enjoyed the possessory right to the following described lands, situate in the counties of Fremont and Big Horn in the Territory and State of Wyoming, to wit:

All of the southwest quarter (S. W. $\frac{1}{4}$) of the southeast quarter (S. E. $\frac{1}{4}$), and the east half (E. $\frac{1}{2}$) of the southwest quarter (S. W. $\frac{1}{4}$) of section thirty (30), and the northeast quarter (N. E. $\frac{1}{4}$) of the northwest quarter (N. W. $\frac{1}{4}$) of section thirty-one (31) in township fifty-eight (58) north of range ninety-seven (97) west, containing one hundred sixty (160) acres of Government lands, according to the Government survey thereof.

5 5. That the said lands are agricultural lands and are arid, requiring artificial irrigation to produce any kind of crop thereon, and that the said William A. Morris, your orator, has occupied, farmed and used the said lands during all of the time hereinbefore mentioned, and during all of the time since the 19th day of March, A. D. 1887, your orator has had the use and the right to use two hundred and fifty (250) inches, statutory measurement, of the waters of a certain creek, commonly known as and called Sage Creek, a tributary to the Stinkingwater River, which flows down to

the point of diversion or where your orator takes the water from said Sage Creek for irrigating the said lands, and that your orator has no other available source of supply of water for the purpose of irrigating said lands, or for domestic purposes, or for the purpose of watering stock, than the waters of said Sage Creek and its tributaries, and that said water right and appropriation is of the value of two thousand dollars.

6. That your orator has appropriated 250 inches, statutory measurement, of the waters of said Sage Creek aforesaid, for said purposes, in accordance with the laws of the State of Wyoming, and the laws of the State of Montana, and has continuously used and appropriated said waters to said purposes on said land, and that the same has been, and will continue to be, necessary to the successful growing and maturing of crops on said lands and necessary and appropriate and useful for your orator as a farmer and stockraiser and breeder.

7. That the appropriation of said waters was made by your orator on the 25th day of June, A. D. 1887, by constructing a dam and ditch tapping said Sage Creek at a point on the northwest quarter (N. W. $\frac{1}{4}$) of section nineteen (19), township fifty-eight (58) north of range ninety-seven (97) west, in said Fremont County, State of Wyoming, running in a southeasterly direction to and upon the above-described lands of your orator, and that said ditch has all of said time been provided with a lawful headgate for the regulation of the flow of the water through said ditch, and that said ditch and headgate have at all times been capable of carrying, and did carry (when there was sufficient quantity flowing in said stream) two hundred and fifty (250) inches, statutory measurement, of the waters of said Sage Creek.

8. That during all of the times hereinbefore mentioned, your orator has used and enjoyed the use of 250 inches of said waters of Sage Creek under a claim of right and of prior appropriation of the same, and adversely to the defendants, and each and all of them, without let or hindrance from any person until within the past three years when the defendants settled upon said Sage Creek, and its tributaries in the State of Montana, and constructed dams, dikes and ditches and other obstructions in the said Sage Creek and its tributaries, and during said time, or portions thereof, and particularly during the summer of the past three years, by means of their said dams, dikes and ditches and other obstructions placed in said stream, and its tributaries, have diverted large quantities of the said waters from the said stream and its tributaries, to and upon lands claimed and occupied by them, thereby wholly depriving your orator from the use and enjoyment thereof, so that during a portion of the past three summers, your orator was not able to get a sufficient supply of water for irrigating his crops planted and growing on his said lands, and that during the latter portion of the last three irrigating seasons, the defendants have turned all of the waters of said stream, and its tributaries, thus depriving your orator of the whole amount of said waters, which

he appropriated prior to the appropriation or use of the same by the defendants, or any of them.

9. That by reason of the wrongful taking and using of said waters by the defendants, as aforesaid, the defendants have damaged your orator, and your orator has suffered damages by reason of the same, in the sum of two thousand five hundred (\$2,500.00) dollars.

10. That your petitioner is informed and believes, and
8 therefore alleges the fact to be, that defendants, and each of them, threaten to continue to so divert and use the waters of said Sage Creek and its tributaries, notwithstanding the prior rights of your orator thereto, and in defiance of the rights of your orator in the premises, and that unless so restrained from so diverting and using said waters, and thus depriving your orator from the use and enjoyment of the same, the crops now growing and maturing on his said lands will wither and dry up and will be wholly lost to him, and that he will be compelled to remove himself and family and his stock from said lands and premises, to his great and irreparable damage, and that, as he is informed and believes, he has not a plain, speedy or adequate remedy against said acts and threatened acts of the defendants, at law, and your orator therefore asks this Honorable Court to grant him equity in the premises.

Wherefore, your orator prays this Honorable Court to grant a decree herein that he is the owner and appropriator, and entitled to the prior use and enjoyment of 250 inches, statutory measurement, of the waters of said Sage Creek, and that such right to its use is prior and superior to the right or use of the same by defendants, and each and all of them;

That your orator is entitled to damages in this action for the wrongful diversion of the waters of said stream in the sum of two thousand five hundred (\$2,500.00) dollars;

9 That this Honorable Court make an order upon each and all of the defendants to appear in this Court to show cause why they, and each of them, and each of their employees, agents, servants and all other persons acting under their direction or authority, should not be enjoined and restrained from in any way interfering with the rights of your orator to the use of the said 250 inches of the said waters of said Sage Creek, and that upon said hearing, the said defendants, and each of them, and their agents, servants, and all persons acting under or by their authority, be enjoined and restrained from in any way interfering with the flow of water in said Sage Creek and its tributaries, pending the determination of this action; that upon final determination of this action, the said restraining order be made permanent; for all costs of this action, and for such other and further relief as to this Honorable Court may seem equitable and just in the premises as required by the principles of equity and good conscience;

May it please your Honor to grant unto your orator not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpoena of the United States of America directed to the said defendants, J. N. Bean, John Sadring, L. O. Diltz, Allen P. Graham, William Eley, Curtis Beeler, Charles Ingram, W. R.

10 Bainbridge, C. Runyan, William Sholtz, C. E. Steele, Bert Bent, Wallace Bent, John Rhodes, F. Banderof, O. S. Erickson, Tillman C. Graham, James Pauley, C. M. Brown, John Bowler, J. A. King, A. Holm, C. H. Young, Corbett Bennett and Michael Wrote, commanding them on a day certain to appear and answer unto this bill of complaint and to abide and perform such order and decree in the premises as to the Court shall seem proper and required by the principles of equity and good conscience.

FRED H. HATHHORN,
Solicitor for Orator.

FRED H. HATHHORN,
Of Counsel.

STATE OF MONTANA,
County of Yellowstone, ss:

William A. Morris, being first duly sworn, deposes and says: That he is a citizen of the United States and a resident of the State of Wyoming; that he has heard read the foregoing petition and knows the contents thereof, and that the matters and things therein stated are true of his own knowledge, except the matters therein stated on his information and belief, and as to those matters he believes to be true, and further saith not.

WILLIAM A. MORRIS.

11 Subscribed and sworn to before me this 16th day of January, A. D. 1903.

[SEAL.] FRED H. HATHHORN,
Notary Public in and for Yellowstone County, Montana.

[Endorsed:] Title of Court and Cause. Bill of Complaint. Filed and entered Jan. 20, 1903. Geo. W. Sproule, Clerk. By Fred H. Drake, Deputy.

And thereafter, to wit, on the 20th day of January, A. D. 1903, a subpoena in equity was duly issued herein, which said subpoena in equity is entered of final record herein as follows, to wit:

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Judicial Circuit, District of Montana.

In Equity.

Subpoena on Bill of Complaint.

The President of the United States of America, Greeting, to J. N. Bean, John Sadring, L. O. Dilts, Allen P. Graham, William Eley, Curtis Beeler, Charles Ingram, W. R. Bainbridge, C. Runyan, William Sholtz, C. E. Steele, Bert Bent, Wallace Bent, John Rhodes, F. Banderof, O. S. Erickson, Tillman C. Graham,
12 James Pauley, C. M. Brown, John Bowler, J. A. King, A. Holm, C. H. Young, Corbett Bennett and Michael Wrote, Defendants.

You are hereby commanded, that you be and appear in said Circuit Court of the United States aforesaid, at the courtroom in Helena on the 2d day of March, A. D. 1903, to answer a bill of complaint exhibited against you in said court by William A. Morris, complainant, who is a citizen of the State of Wyoming, and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit, under the penalty of five thousand dollars.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 20th day of January, in the year of our Lord one thousand nine hundred and three, and of our Independence the 127th.

[SEAL.]

GEO. W. SPROULE, *Clerk*,
By FREDERICK H. DRAKE,
Deputy Clerk.

Memorandum Pursuant to Rule 12, Supreme Court U. S.

You are hereby required to enter your appearance in the above suit, on or before the first Monday of March next, at the
13 Clerk's Office of said Court, pursuant to said Bill; otherwise the said Bill will be taken pro confesso.

[SEAL.]

GEO. W. SPROULE, *Clerk*,
By FREDERICK H. DRAKE,
Deputy Clerk.

FRED H. HATHHORN,

Solicitor for Complainant, Billings, Montana.

UNITED STATES MARSHALL'S OFFICE.

District of Montana:

I hereby certify that I received the within writ on the 20th day of January, 1903, and personally served the same by delivering to, and leaving with J. N. Bean, C. H. Young, James Pauley, at Bridger,

1/22, 1903; O. S. Erickson and M. Write, near Bowler, 1/22, 1903; A. P. Graham, W. Eley, W. R. Bainbridge, W. T. Sholtz, C. E. Steele, Bert Bent, Wallace Bent, J. A. King and T. G. Graham, and John Rhodes, C. Bennett, near Bowler, 1/23, 1903; C. M. Brown, and L. O. Dilts at Billings, 1/24, 1903—unable to find the rest—said defendants named therein personally, in said district, a copy thereof.

January 26th, 1903.

C. F. LLOYD,

U. S. Marshal,

By M. H. WALL, *Deputy.*

14 [Endorsed:] No. 666. U. S. Circuit Court, Ninth Circuit, District of Montana. In Equity. William A. Morris vs. J. N. Bean et al. Subpoena. Filed Feb. 2d, 1903. Geo. W. Sproule, Clerk. By Fred H. Drake, Deputy Clerk.

And thereafter, to wit, on the 7th day of May, A. D. 1903, the plea of defendants, J. N. Bean et al., was filed herein, which said plea is entered of final record herein as follows, to wit:

In the United States Circuit Court, Ninth Circuit, District of Montana.

In Equity.

WILLIAM A. MORRIS

VS.

J. N. BEAN, JOHN SADRING, L. O. DILTZ, ALLEN P. GRAHAM, WILLIAM ELEY, CURTIS BOELER, CHARLES INGRAM, W. R. BAINBRIDGE, C. RUNYAN, WILLIAM SHOLTZ, C. E. STEELE, BERT BENT, WALLACE BENT, JOHN RHODES, F. BANDEROF, O. S. ERICKSON, TILLMAN C. GRAHAM, JAMES PAULEY, C. M. BROWN, JOHN BOWLER, J. A. KING, A. HOLM, C. H. YOUNG, CORBETT BENNETT, and MICHAEL WROTE,

15 *Plea of J. N. Bean, W. R. Bainbridge, Bert Bent, Wallace Bent, and Corbett Bennett, the Above-named Defendants, to a Part of the Bill of Complaint of the Above-named Complainant, and the Answer of These Said Defendants to the Remainder of Such Bill.*

I.

We, the defendants, J. N. Bean, W. R. Bainbridge, Bert Bent, Wallace Bent and Corbett Bennett, by protestation, not confessing or acknowledging, all or any part of the matters or things, in the said bill of complaint mentioned to be true, in such manner and form as the same are therein set forth and alleged, do plead thereto, and for plea say: That one, A. W. Adams, and Mrs. Nellie Bowler, who are citizens of the United States, and the State of Montana, residing within the county of Carbon, and within the jurisdiction of

the above-entitled court, and one John Frost, an Indian, a member of the Crow Tribe, residing within the State of Montana, within the jurisdiction of this court, and the Burlington & Quincy Railroad in Montana, a corporation organized and existing under the laws of the State of Montana, and carrying on its business by its officers and agents, within the jurisdiction of the aforesaid Court, are each and all maintaining dams and dikes, in Sage Creek, a tributary of the Stinkingwater River, mentioned in the bill of complaint,

16 and by means of ditches have diverted, and unless restrained by this Court, will appropriate the waters of Sage Creek, above the headgate of complainant's ditch, as mentioned in his bill of complaint to such an extent that although these defendants divert none of the waters of said Sage Creek, the same will not flow to complainant's ditch, but will be diverted by the aforesaid persons; and that the said A. W. Adams, Mrs. Nellie Bowler, John Frost, and the Burlington and Quincy Railroad in Montana, ought to be made parties to the said bill, as we are advised; of which matters and things we aver to be true, and plead the same, to the said bill, and hereby pray the judgment of this Honorable Court whether said persons should not be made parties defendant to the said bill.

GEO. W. PIERSON,

Solicitor and of Counsel for Defendants,

J. N. Bean, W. R. Bainbridge, Bert Bent, and Corbett Bennett.

I hereby certify that the foregoing plea is in my opinion well founded in point of law.

Red Lodge, Montana, May 3d, 1903.

GEO. W. PIERSON,

Of Counsel for Defendants Above Mentioned.

17 STATE OF MONTANA,

County of Carbon, ss:

Bert Bent, being duly sworn, deposes and says: I am one of the above-named defendants, and that the foregoing plea is true in point of fact, and is not interposed for delay.

BERT BENT,

Subscribed and sworn to before me this 4th day of May, 1903.

[SEAL.]

C. L. MERRILL,

*Notary Public in and for the County
of Carbon, State of Montana.*

[Endorsed:] Title of Court and Cause. Plea of Defendants Bean, Bennett, Bents and Bainbridge. Filed May 7, 1903. Geo. W. Sproule, Clerk.

18 And thereafter, to wit, on the 7th day of May, A. D. 1903, the answer and disclaimer of defendants C. E. Steele et al. was filed herein, which said answer and disclaimer is entered of final record as follows, to wit:

In the United States Circuit Court, Ninth Circuit, District of
Montana.

In Equity.

WILLIAM A. MORRIS

VS.

J. N. BEAN, JOHN SADRING, L. O. DILTZ, ALLEN P. GRAHAM, WILLIAM ELEY, CURTIS BOELER, CHARLES INGRAHAM, W. R. BAINBRIDGE, C. RUNYAN, WILLIAM SHOLTZ, C. E. STEELE, BERT BENT, WALLACE BENT, JOHN RHODES, F. BANDEROF, O. S. ERICKSON, TILLMAN C. GRAHAM, JAMES PAULEY, C. M. BROWN, JOHN BOWLER, J. A. KING, A. HOLM, C. H. YOUNG, CORBETT BENNETT and MICHAEL WROTE.

Disclaimer and Answer.

The disclaimer and answer of the above-named defendants,
19 C. E. Steele, John Rhodes, and A. Holm, to the bill of complaint of the above-named complainant: These defendants and each of them, now and at all times hereafter, saving and reserving to themselves all manner and benefit of advantage to exception to the many errors in such bill of complaint contained, saith that they doth not know that any of these defendants, to their knowledge or belief ever have, nor did they or any of them claim or pretend to have, nor doth they now claim, any right, title or interest in or to the waters of Sage Creek, a tributary of the Stinkingwater River, in the said complainant's bill set forth, or any part thereof; and these defendants and each of them do disclaim all right and title and interest in and to the waters of Sage Creek, in the said complainant's bill mentioned, and every part thereof.

II.

Each of these defendants for further answer to the complainant's bill, admit that they are citizens and residents of the State of Montana, and that Sage Creek, mentioned in complainant's bill, is a tributary of the Stinkingwater River, but deny that these defendants or any of them, have constructed any dams, dikes or ditches in said Sage Creek, or its tributaries, in the manner alleged in complainant's bill, or at any time or at all; and deny that they or any
20 of them have diverted or appropriated any of the waters of Sage Creek, or have deprived the complainant of any of the waters of such stream mentioned in the bill of complaint, and deny that they have ever threatened or intended to divert or intend to divert any of the waters of such stream, or that they are making any preparation whatever to interfere with the natural flow of the waters thereof.

III.

These defendants and each of them deny that by reason of the taking of any waters of Sage Creek, aforesaid, the complainant has been damaged in the sum of twenty-five hundred dollars, or in any

other sum or at all, by reason of the acts of these defendants, and as to the remaining allegations contained in such bill of complaint which have not herein been expressly admitted or denied, these defendants have not sufficient information to form a belief in regard thereto, and therefore deny the same. Defendants pray the bill may be dismissed with costs.

C. E. STEELE.
JOHN RHODES.
ARAN HOLM.

GEO. W. PIERSON,
Attorney for Answering Defendants.

STATE OF MONTANA,
County of Carbon, ss:

21 C. E. Steele, John Rhodes, and A. Holm, each, being duly sworn for himself, says that they are the above-mentioned answering defendants; and that so much of the foregoing answer and disclaimer as concerns their own acts and deeds is true to the best knowledge of each of them; and so much thereof as concerns the acts or deeds of any other person or persons, they believe it to be true.

C. E. STEELE.
JOHN RHODES.
ARAN HOLM.

Subscribed and sworn to before me this 4th day of May, 1903.

[SEAL.]

CHAS. L. MERRILL,
Notary Public.

[Endorsed:] Title of Court and Cause. Answer and Disclaimer of Defendants, Steele, Rhodes, and Holm. Filed and Entered May 7, 1903. Geo. W. Sproule, Clerk.

22 And thereafter, to wit, on the 7th day of May, A. D. 1903, the answer of defendants, J. N. Bean et al. was filed herein, which said answer is entered of final record herein as follows, to wit:

In the United States Circuit Court, Ninth Circuit, District of
Montana.

In Equity.

WILLIAM A. MORRIS

vs.

J. N. BEAN, JOHN SADRING, L. O. DILTZ, ALLEN P. GRAHAM, WIL-
lam Eley, Curtis Boeler, Charles Ingram, W. R. Bainbridge, C.
Runyan, William Sholtz, C. E. Steele, Bert Bent, Wallace Bent,
John Rhodes, F. Banderof, O. S. Erickson, Tillman C. Graham,
James Pauley, C. M. Brown, John Bowler, J. A. King, A. Holm,
C. H. Young, Corbett Bennett and Michael Wrote.

23 *The Answer of the Above-named Defendants, J. N. Bean, W.
R. Bainbridge, Bert Bent, Wallace Bent, and Corbett Ben-
nett, to the Part of the Bill of Complaint of the Above-named
Complainant, not Covered by Plea.*

In answer to the bill of complaint, we, J. N. Bean, W. R. Bain-
bridge, Bert Bent, Wallace Bent and Corbett Bennett, say as follows:

I.

That as to the citizenship of the complainant, we or any of us
have not sufficient knowledge or information to form a belief, as
to such allegations of citizenship, and therefore deny that such com-
plainant was a citizen of the Territory or now is or has been a citi-
zen of the State of Wyoming.

II.

We admit that defendants are residents and citizens of the State
of Montana.

III.

We deny the amount involved in this action exceeds the sum of
two thousand dollars.

IV.

We deny that the complainant, William A. Morris, has had and
enjoyed the possession of the lands described in his bill of complaint
for a period of fifteen years, or that he has had the possessory right
to the same for a period exceeding eight years.

24

V.

We deny that the complainant, William A. Morris, has farmed
and used said lands mentioned in the bill of complaint, or any of
such land, excepting sixty-five acres, or that he has tilled and farmed
any part of such land for the term of fifteen years, or for any greater
period than eight years, and deny that he has tilled or farmed any
portion of such tract of land excepting sixty-five acres, or that he

now requires to exceed forty inches of water, as measured by the laws of the State of Montana, or one cubic foot per second of time of the continuous flow of the waters of Sage Creek, for the purpose of irrigating the portion of such tract of land as now requires irrigation; and we further deny that the complainant has no other available source or supply of water for the purpose of irrigating said lands, or for domestic purposes, or for the purpose of watering stock, than the waters of Sage Creek; and deny that the water right and appropriation of the complainant, mentioned in his bill of complaint, is of the value of two thousand dollars.

VI.

We deny that the said complainant has appropriated two hundred and fifty inches of the waters of Sage Creek, as alleged in his bill of complaint, or that he has appropriated any water at all, of
25 such stream; or that he has made any appropriation in accordance with the laws of the State of Wyoming, or the laws of the State of Montana; and further deny that the complainant has used the waters of Sage Creek continuously, or appropriated said waters for the purpose of irrigation or domestic use, or the watering of stock on such land; or that the use of the same is necessary for the purpose of maturing crops, or for the use of complainant, as a farmer or stock raiser and breeder.

VII.

We deny that the complainant on the 25th day of June, 1887, appropriated the waters of Sage Creek, mentioned in the bill of complaint, or that he ever made any appropriation of the waters of such stream at any time; and deny that said complainant owned a ditch, diverting the waters of Sage Creek to and upon the lands mentioned in the bill of complaint, at any time prior to on or about the first day of November, 1895, and deny that such ditch has a capacity of two hundred and fifty inches, as measured under the laws of the State of Montana, or that its capacity exceeds one hundred inches.

VIII.

We deny that during all of the time mentioned in the bill of complaint or at any time, or at all, that the complainant has used and enjoyed the use of two hundred fifty inches of the waters of
26 Sage Creek, or any less or greater amount, of the waters of such stream, or at all, or that he has enjoyed the use of any waters of such stream, under any claim of right or prior appropriation of the same, or that he has used or diverted any of the waters of such stream adversely to these affiants or any of them, or that he has enjoyed the use of the same or any part thereof without let or hindrance, until within the last three years; that these defendants admit the construction of dams and ditches by them, in severalty, and that they have diverted the waters of such stream, and its tributaries, in severalty, to and upon the lands occupied by them, but deny that the complainant's right of

appropriation, of such water is prior to the rights of appropriation of these defendants or any of them; and the complainant's allegations in his bill of complaint *is* indefinite as to the extent he has been deprived of water, and defendants have not sufficient knowledge or information to form a belief as to such allegations, and therefore deny the same.

IX.

These defendants and each of them deny that by reason of the wrongful taking or using of the waters of said stream by them or any of them, the complainant has been damaged or suffered damage in the sum of two thousand five hundred dollars, or that he has
27 been damaged in a less or greater amount, or that the complainant has been damaged at all by reason of any acts of these defendants or any of them.

As a further ground of defense, affirmative matters and cross-complaint, we, these answering defendants, say and allege as follows:

I.

That the said defendant J. N. Bean is a citizen of the United States and the County of Carbon, State of Montana, not the owner of more than one hundred sixty acres of land, and never has made any entry of agricultural lands, under the land laws of the United States other than as herein mentioned. That on or about the 1st day of March, 1893, said defendant settled upon the southeast $\frac{1}{4}$ of the northeast $\frac{1}{4}$, and the north one-half of the southeast quarter of section thirty-six, township eight, south of Range twenty-five east, M. P. M., together with forty acres of unsurveyed lands which will probably be designated as lot two of section thirty-one, township eight south of range twenty-six east, with the intention of making his homestead entry thereon, and he has so entered the surveyed portion of such tract, and intends to enter the remainder of such tract as soon as the same is open for filing, at the local land office, and ever since such day of settlement this defendant has enjoyed
the exclusive occupancy of the whole of such tract of land.

28 Said tract of land is one hundred and sixty acres in area situated in the county of Carbon, State of Montana, lying riparian to Piney Creek, a tributary of Sage Creek, mentioned in the bill of complaint, and said land is being watered, and is capable of irrigation from said Piney Creek. That said land is dry and arid without artificial irrigation, but is agricultural in character with artificial irrigation, and has been made to produce and will produce valuable crops of hay, grain and vegetables. That on or about the 29th day of June, 1893, while this defendant was so in the possession of these lands, he appropriated and diverted four cubic feet per second of time of the continuous flow of the waters of said Piney Creek, in the county of Carbon, State of Montana, for the purpose of irrigating such lands, and on or about said day posted his notice in writing at the intended point of diversion of his claim of such water, and intended appropriation, and within twenty days thereafter filed

his said notice of such appropriation of record in the office of the County Clerk and Recorder of Yellowstone County, the county in which said land was situated at said time, and within forty days of such day of appropriation he began the construction of a ditch, tapping said stream at its north bank, at a point of rocks near the mouth of the canyon of such stream, and prosecuted the construction of such ditch with reasonable diligence, until completion, and

29 the same running in a westerly direction, to and upon said lands conducting and conveying said four cubic feet per second of time of the waters of said Piney Creek, and that said appropriation and diversion was made upon the public domain of the United States. That no other person is interested with this defendant in such appropriation, and that said land requires, and will continue to require the whole of said water for the purpose of irrigating said lands properly, as well as to supply the needs of defendant for domestic uses for himself and family and watering of his stock, and ever since said day of appropriation this defendant has had and enjoyed the use of all of said waters so appropriated by him, continuously, uninterruptedly, without let or hindrance, openly and adversely to all persons, with the knowledge and without the objection of said complainant, and is now the owner of the right to appropriate and divert four cubic feet per second of time of the waters of Piney Creek, a tributary of Sage Creek aforesaid, and this defendant has tilled, cultivated and seeded said lands, and has valuable crops growing thereon, and has placed valuable improvements, consisting of dwelling-houses, barns, stables, fences and fruit trees, relying on his right to use the waters of such stream,

30 and that if this defendant is now restrained from using the waters of such stream, such lands and improvements will become valueless and wholly lost to the said defendant.

II.

That the said defendant, W. R. Bainbridge, has declared his intention to become a citizen of the United States, and is now a resident of the county of Carbon, State of Montana, and has his homestead filing under the laws of the United States, on the southwest $\frac{1}{4}$ of the southeast $\frac{1}{4}$ of section thirty-five, township eight south, of range twenty-five east, and the northwest $\frac{1}{4}$ of the northeast $\frac{1}{4}$, and the north $\frac{1}{2}$ of the northwest $\frac{1}{4}$ of section two, in township nine south, of range twenty-five east, M. P. M., that defendant settled upon said lands on or about the first day of August, 1896, and ever since such day has enjoyed the exclusive occupancy and possession of such tract, the same being one hundred and sixty acres in area, agricultural in character, situated in the county of Carbon, State of Montana, lying riparian to Piney Creek, a tributary of Sage Creek, mentioned in the bill of complaint, all of said land being watered, and being capable of irrigation from said Piney Creek; that said land is dry and arid, without artificial irrigation, but has been made to produce and will produce valuable crops of hay, grain and vegetables with artificial irrigation. That on or

about the 15th day of September, 1899, while this defendant was so in the possession of such land, he appropriated and diverted four cubic feet per second of time of the continuous flow of the waters of said Piney Creek, in the county of Carbon, State of Montana, for the purpose of irrigating such lands, by means of a ditch tapping such stream on its east bank about one and one-half miles above said lands, and conveying the same to and upon said premises, and that said appropriation and diversion was made upon the public domain of the United States. That no other person is interested with this defendant in such appropriation, and that said land requires and will continue to require the whole of said water, for the purpose of irrigating said lands, as well as to supply the needs of the defendant, for domestic uses for himself, and watering of his stock, and ever since said day of appropriation this defendant has had and enjoyed the use of all of said waters so appropriated by him, continuously, uninterruptedly, without let or hindrance, openly and adversely to all persons, with the knowledge and without objection of the said complainant, and this defendant is now the owner of the right to appropriate and divert four cubic feet per second of time of the waters of Piney Creek aforesaid, and has tilled, cultivated and seeded his said lands and now has valuable crops growing thereon, and has placed valuable improvements, consisting of dwelling-house, barns, stables and fences thereon, relying on his right to use the water of such stream, and if defendant is now restrained from using the waters of said Piney Creek, such land and improvements will become valueless and wholly lost to this defendant.

III.

That the said defendant, Corbett Bennett, is a citizen of the United States and a resident of the county of Carbon, State of Montana, and has his homestead filing, under the laws of the United States, on the northwest $\frac{1}{4}$ of the southeast $\frac{1}{4}$, and the east one-half of the southwest quarter, and the southeast $\frac{1}{4}$ of the northwest $\frac{1}{4}$ of section seven, in township eight south, of range twenty-five east, M. P. M., the same being one hundred sixty acres in area, situated in the county of Carbon, State of Montana, lying riparian to Sage Creek, mentioned in the bill of complaint, being watered, and is all capable of irrigation from such stream, that said land is dry and arid without artificial irrigation, but is agricultural in character, and with artificial irrigation has been made to produce and will produce valuable crops of hay, grain and vegetables. That on or about the first day of November, 1892, the defendant's predecessors in interest settled upon the aforesaid lands with the intention of entering his homestead filing thereon, at the local land office, as soon as the same should be surveyed and open for filing, and on or about the 1st day of November, 1892, in the county of Carbon, State of Montana, for the purpose of irrigating the above-described land, this defendant's predecessors in interest appropriated and diverted four cubic feet per second of time of the continuous flow of the waters of said Sage Creek, on the public do-

main, in the county of Carbon, State of Montana, for the purpose of irrigating such land, and on or about said day, posted a notice in writing at the intended point of diversion, of his claim of such water, and intended appropriation, and within twenty days thereafter, filed his said notice of appropriation in the office of the County Clerk and Recorder of Yellowstone County, the county in which said land was situated at said time, and within forty days of such day of posting such notice commenced the construction of such ditch, tapping such stream, on its east bank at a point in the northeast $\frac{1}{4}$ of the northwest quarter of section seven, township eight south, range twenty-five east, and prosecuted the construction of such ditch with reasonable diligence until completed, the same running in a westerly direction, to and upon said land, conducting and conveying said four cubic feet per second of time of the waters of said Sage Creek; that no other person is interested with this defendant in such appropriation, and that said land requires and will continue to require the whole of said water for the purpose of irrigating said lands, as well as to supply the needs of defendant

34 for domestic uses of himself and family and the watering of his stock, and ever since such day of appropriation this defendant has had and enjoyed the use of all of said waters, so appropriated by him, continuously, uninterruptedly, without let or hindrance, openly and adversely to all persons, with the knowledge and without objection of said complainant, and defendant is now the owner of the right to appropriate and divert four cubic feet per second of time of the waters of Sage Creek aforesaid, and this defendant has tilled, cultivated and seeded said lands, and has valuable crops growing thereon, and has placed valuable improvements thereon, consisting of dwelling, barns, stables, and fences, relying on his right to use the waters of such stream, and if defendant is now restrained from using the waters of Sage Creek, such land and improvements will become valueless, and wholly lost to this defendant.

IV.

That the defendant, Bert Bent, whose true name is S. W. Bent, is a citizen of the United States, and a resident of the County of Carbon, State of Montana, and now has his homestead entry, under the laws of the United States, on the west one-half of the southeast quarter and the southeast quarter of the southwest quarter of section six, and the northwest quarter of the northeast quarter of section

35 P. M. township eight south of Range twenty-five east, M. That this defendant's predecessor in interest on or about the 1st day of September, 1892, settled upon said lands with the intention of entering the same, under the land laws of the United States, as soon as the same should be surveyed, and open for filing, and ever since such day of settlement this defendant and his predecessors in interest have enjoyed the exclusive occupancy thereof; said tract of land is one hundred and sixty acres in area, situated in the County of Carbon, State of Montana, lying riparian to said Sage Creek, mentioned in the bill of complaint, and is being watered, and is capable of irrigation from said stream. Said land is

dry and arid without artificial irrigation, but is agricultural in character, and with artificial irrigation has been made to produce and will produce valuable crops of hay, grain and vegetables. That on or about the 28th day of October, 1892, this defendant's predecessor in interest, while in possession of said land, diverted and appropriated four cubic feet per second of time of the continuous flow of the waters of said Sage Creek, on the public domain, in the county of Carbon, State of Montana, for the purpose of irrigating such land, and on or about said day posted his notice in writing jointly with the predecessors in interest of the defendant Wallace Bent, at the intended point of diversion, of the waters of such stream by them, of his claim of such water right, and intended appropriation, and within twenty days thereafter filed his said notice of such appropriation in the office of the County Clerk and Recorder of Yellowstone County, where said land was situated, at such time, and within forty days of such day of appropriation, he with the predecessors in interest of the said Wallace Bent, began the construction of a ditch, tapping said stream on its east bank, about three hundred yards, up and above on Sage Creek, where the Bridger road crosses said stream, and prosecuted the construction of said ditch with reasonable diligence until completion, the same running in a southeasterly direction to and upon said land of this defendant, and conducting and conveying four cubic feet per second of time of the waters of Sage Creek, to the lands of this defendant. That no other person is interested with this defendant in such appropriation and that said land requires, and will continue to require, the whole of said water for the purpose of irrigating the same, as well as to supply the needs of defendant for domestic uses of himself and watering of his stock, and ever since said day of appropriation this defendant and his predecessors in interest have enjoyed the use of all the waters so appropriated, continuously, uninterruptedly, without let or hindrance, openly and adversely, to all persons, with the knowledge and without objection of said complainant, and this defendant is

36 now the owner of the right to appropriate and divert four cubic feet per second of time of the waters of Sage Creek aforesaid, and this defendant has tilled, cultivated and seeded said lands, and has valuable crops growing thereon, and has placed valuable improvements, consisting of dwelling-house, barns, stables, fence and fruit trees, relying on his right to use the waters of such stream, and that if defendant is restrained from diverting the same, such land and improvements will become valueless and wholly lost to said defendant.

37

V.

The defendant Wallace Bent is a citizen of the United States, and a resident of the county of Carbon, State of Montana, and now has his homestead entry, under the laws of the United States, on the west $\frac{1}{2}$ of the northeast $\frac{1}{4}$, of section six, township eight south of range twenty-five east, M. P. M., and the west $\frac{1}{2}$ of the southeast $\frac{1}{4}$ of section thirty-one, township seven south, of range twenty-five east

M. P. M.; that this defendant's predecessor in interest on or about the 1st day of September, 1892, settled upon said lands, with the intention of entering the same, under the land laws of the United States, as soon as the same should be surveyed and open for filing, and ever since such day of settlement this defendant and his predecessors in interest have enjoyed the exclusive occupancy
38 and possession thereof. Said tract of land is one hundred and sixty acres in area, situated in the county of Carbon, State of Montana, lying riparian to said Sage Creek, mentioned in the bill of complaint, and is being watered, and is capable of irrigation from said stream. Said land is dry and arid without artificial irrigation, but is agricultural in character, and with artificial irrigation has been made to produce and will produce valuable crops of hay, grain and vegetables. That on or about the 28th day of October, 1892, this defendant's predecessors in interest while in possession of said land, diverted and appropriated four cubic feet per second of time of the continuous flow of the waters of Sage Creek, on the public domain, in the county of Carbon, State of Montana, for the purpose of irrigating such land, and posted notice of such appropriation, and filed the same of record, and constructed, a ditch jointly with the predecessors in interest of the said defendant S. W. Bent, in the manner alleged in the preceding paragraph, conducting and conveying four cubic feet per second of time of the waters of said Sage Creek, to and upon the lands of this defendant. That no other person is interested with this defendant in such appropriation, and that said land requires, and will continue to require, the whole of said water for the purpose of irrigating the same, as well as to supply the needs of defendant for domestic uses of himself and family
39 and watering of his stock, and ever since said day of appropriation this defendant and his predecessors in interest have enjoyed the use of all the waters so appropriated, continuously, uninterruptedly, without let or hindrance, openly and adversely, to all persons, with the knowledge and without objection, of said complainant, and this defendant is now the owner of the right to appropriate and divert four cubic feet per second of time of the waters of Sage Creek aforesaid, and this defendant has tilled, cultivated and seeded said lands, and has shade trees and other valuable crops growing thereon, and has placed valuable improvements, consisting of dwelling-house, barns, stables, fences thereon, relying on his right to use the waters of such stream, and that if defendant is restrained from diverting the same such land and improvements will become valueless and wholly lost to said defendant.

VI.

That said Sage Creek, mentioned in the bill of complaint, rises and has its head waters in the State of Montana, and flows into the State of Wyoming, and the diversion of each of these defendants is made in the State of Montana, and each of these defendants have vested rights of appropriation, in the waters of such stream, under the constitution and the laws of the State of Montana.

VII.

40 That there has been no joint or community appropriation, use, or diversion of the waters of said stream, by these defendants with any other person or persons, and that each of these defendants is possessed of his individual right in said stream, and each has for himself diverted, appropriated and used the waters of said stream and its tributaries, upon his individual land independently and adversely to all other persons particularly, the defendants, and none of such defendants divert or appropriate two hundred and fifty inches of the waters of Sage Creek, and said complainant has had and enjoyed as great a flow of the waters of such stream within the past three years as he has had at any time since any of the defendants have diverted water therefrom.

VIII.

These defendants further say that owing to the peculiar formation and sub-stratum of the soil forming the bed of such creek, and its tributaries, the water flowing therein sinks into the sands and rises again at points below on said stream, above and below the head gate of the complainant in such quantity as to give complainant the same supply of water that he has enjoyed at any time, since any of the defendants has settled upon such stream, and each of these defendants divert the waters of said Sage Creek about thirty miles above the complainant's headgate, and if all the water of said stream were allowed to flow down to complainant's ditch he would
41 not receive sufficient water to irrigate his lands mentioned in the bill of complaint.

We submit that we have a right to divert the waters of Sage Creek, and that an injunction should not issue against us, and the said bill ought to be dismissed with costs.

That in the event such an injunction is granted we pray that the right of appropriation of each defendant may be defined, and that they be restrained in the order of the date of their appropriation.

GEO. W. PIERSON,

*Attorney for Answering Defendants, J. N.
Bean, W. R. Bainbridge, Bert Bent, Wal-
lace A. Bent, Corbet Bennett.*

STATE OF MONTANA,

County of Carbon, ss:

J. N. Bean, W. R. Bainbridge, Wallace Bent, S. W. Bent and Corbett Bennett, each being duly sworn for himself, says that they are the above-mentioned defendants. So much of the foregoing answer as concern- my own acts and deeds is true to the best of my knowledge and so much thereof as concerns the acts or deeds of any other person or persons, I believe to be true.

J. N. BEAN.
W. R. BAINBRIDGE.
BERT BENT.
WALLACE A. BENT.
CORBETT BENNETT.

42 Subscribed and sworn to before me this 4th day of May,
1903.

[SEAL.]

CHAS. L. MERRILL,
Notary Public.

[Endorsed:] Title of Court and Cause. Answer of Defendants J. N. Bean, Corbett Bennett, S. W. Bent, Wallace Bent, and W. R. Bainbridge. Filed and entered May 7, 1903. Geo. W. Sproule, Clerk.

43 And thereafter, to wit, on the 23d day of May, A. D. 1903, the answer of defendants J. A. King et al. was filed herein, which said answer is entered of final record herein as follows, to wit:

In the United States Circuit Court, Ninth Circuit, District of Montana.

In Equity.

WILLIAM A. MORRIS

VS.

J. N. BEAN, JOHN SADRING, L. O. DILTZ, ALLEN P. GRAHAM, WILLIAM ELEY, CURTIS BEELER, CHARLES INGRAM, W. R. BAINBRIDGE, C. RUNYAN, WILLIAM SHOLTZ, C. E. STEELE, BERT BENT, WALLACE BENT, JOHN RHODES, F. BANDEROF, O. S. ERICKSON, TILLMAN C. GRAHAM, JAMES PAULEY, C. M. BROWN, JOHN BOWLER, J. A. KING, A. HOLM, C. H. YOUNG, CORBETT BENNETT, and MICHAEL WROTE.

The Answer of J. A. King, Allen P. Graham, Michael Wrote, William Ealy and C. H. Young, Defendants, to the Bill of Complaint.

44 These defendants, saving and reserving unto themselves the benefit of all exceptions to the errors and imperfections in said bill contained, for answer to so much thereof as they are advised is necessary or material for them to answer unto, do aver and say:

1. That as to whether the plaintiff for fifteen years last past has been a resident or citizen of the Territory and State of Wyoming these defendants have not sufficient information to affirm or deny the same;

2. Admit that at all the times mentioned in the Bill of Complaint these defendants were, and are now, residents and citizens of the Territory and State of Montana;

3. Deny that the amount involved in this action exceeds the sum of two thousand dollars (\$2,000.00), exclusive of interest and costs;

4. Deny that for a period of fifteen (15) years last past, or for any greater period than eight (8) years, plaintiff has had or enjoyed possessory right or title to the lands described in paragraph 4 of the bill of complaint, or any part thereof;

5. Deny that any of said lands are agricultural lands or capable of being irrigated or cultivated, except sixty-five (65) acres, or that plaintiff has occupied, irrigated or farmed to exceed said sixty-five (65) acres at any time, and allege that he has only irrigated and farmed said sixty-five (65) acres for a period of eight (8) years last past;

45 6. Deny that plaintiff has had the use or the right to use two hundred and fifty (250) inches, or to exceed forty (40) inches of the waters of Sage Creek for irrigating said lands, and deny that the plaintiff has no other available source of supply of water for irrigating said lands or for domestic use or for watering stock, other than the waters of said Sage Creek or its tributaries, and deny that the water right of plaintiff, if such he have, or his appropriation of the waters of Sage Creek or its tributaries, is or are of the value of \$2,000.00 or any greater value than \$1,000;

7. Deny that plaintiff has appropriated 250 inches, or any number of inches, of the waters of said Sage Creek for said purpose, or for any purpose, in the State of Montana; or that he has continuously appropriated or used said waters for such purposes, or any purpose, on said lands in excess of forty (40) inches, or that 250 inches, or any greater quantity than 40 inches has been, or will continue to be necessary to the successful growing or maturing of crops on said 65 acres of land, or that the same except said 40 inches are necessary or useful for the plaintiff, as a farmer, stock-raiser and breeder;

8. Deny that the appropriation of said waters, as alleged in said bill, was made on the 25th day of June, 1887, or that the
46 same, or any part thereof, was conducted by the plaintiff upon his said lands, except 40 inches of said water, and deny that plaintiff's ditch was provided with a proper headgate or that the plaintiff's ditch or headgate has at all times been capable of carrying or did carry, 250 inches of the waters of said Sage Creek according to lawful measurement thereof;

9. Deny that during all of the times mentioned in the bill of complaint plaintiff has used or enjoyed the use of 250 inches of the waters of said Sage Creek, or under a claim of right or prior appropriation of the same, or any greater quantity than 40 inches, and deny that the same, or any quantity thereof has been used adversely to these defendants, or any of them, without let or hindrance from them, or any of them, until within the last past three years, or at any other time, and deny that within the past three years, or at any other time, the defendants, or any of them, by the construction of dams, dikes, ditches or other obstructions in said Sage Creek or its tributaries, have by means of said dams, dikes, ditches or other obstructions, diverted any of the waters of said stream to which plaintiff was entitled, or that they have wholly or at all deprived the plaintiff from the use or enjoyment of any waters of said creek or its tributaries to which he has been entitled to have or use, and deny that the
47 plaintiff, during any portion of the past three years, was not able to get sufficient supply of water for irrigating his crops planted or growing on his said lands, and deny that during the latter part of the last three irrigating seasons these defendants,

or any of them, have diverted all the waters of said stream or its tributaries to or upon their lands, or that they have deprived the plaintiff of any waters of said stream to which he is entitled;

10. Deny that by reason of the wrongful taking, diverting or using the waters of said Sage Creek by these defendants, or any of them, plaintiff has suffered damage in the sum of \$2,500 or in any other sum, or at all;

11. Deny that these defendants, or any of them, have threatened to continue to divert or use the waters of said Sage Creek or its tributaries, except as they have a right to do as hereinafter set forth, or that they, or any of them, have threatened to divert and use the waters of said Sage Creek in defiance of the rights of the plaintiff in the premises, or that unless restrained from diverting and using said waters they will deprive the plaintiff from the use and enjoyment of any waters to which he is entitled, and deny that there are any crops now growing or maturing on the lands of the plaintiff, or that any crops he may plant or sow upon his said lands in the future will be wholly, or at all, lost to him by reason

of any acts or contemplated acts of these defendants, or that
48 by reason of any such acts plaintiff will be compelled to remove himself and family and stock from his said premises to his great or irreparable or any damage, and deny that if the plaintiff has any remedy against these defendants for the acts complained of in his bill of complaint, such acts, if wrongful, cannot be redressed by an action at law.

Further answering the bill of complaint the defendants allege that they are each citizens of the United States and citizens and residents of the County of Carbon, State of Montana, and have each settled upon, improved and occupied, and are now in possession of, improving and farming, 160 acres of unappropriated Government land of the United States in the valley of and riparian to the said Sage Creek and its tributaries, which said Sage Creek rises and has its source in the Pryor Mountains in the State of Montana, and flows in a southerly direction into the State of Wyoming;

That long prior to the commencement of this action each of these defendants, and his predecessors in interest, appropriated and diverted and used for irrigation purposes on their said lands the waters of said Sage Creek and its tributaries, and that said lands have at all times been, and are now, arid, requiring irrigation to produce any kind of crops thereon, and that the appropriation and

use of the waters of said Sage Creek and its tributaries by
49 each of these defendants and his predecessors, as hereinafter particularly set forth, has been enjoyed continuously and adversely to the plaintiff and with the knowledge and consent of the plaintiff, and without objection or protest by him prior to the commencement of this action, and that the waters so appropriated and used by each of these defendants and his predecessor have been necessary, proper and useful as to quantities and times for the irrigation of their said lands and for domestic purposes, and that said use of said waters for said purposes will continue in the future, and that said lands without the use of said waters as aforesaid are

and will be of little or no value, and that the defendants could not successfully farm said lands or sustain themselves and their families thereon without such use of said waters, as aforesaid.

That the said lands of these defendants, and each of them, are riparian to said stream and subject to and capable of irrigation from its waters, and that each of these defendants have the right to use and are the owners of the appropriation of said waters so used and to be used by them as aforesaid, adversely and prior to the use of the same by the plaintiff under the Constitution and laws of the State of Montana.

Defendants further allege that there has been no joint or community appropriation or use of the waters of said streams, or any of them, by these defendants or any two or more of them, and

50 that each of these defendants is possessed of and entitled to possess and use his individual water right from said stream and its tributaries, and has each for himself individually diverted, appropriated and used the waters of said stream and its tributaries upon his own individual land independently and adversely to each of his co-defendants and all other persons.

Defendants further allege that owing to the peculiar formation and sub-stratum of the soil forming the banks and bed of said Sage Creek and its tributaries, the waters flowing therein sink into the sand and sub-stream and rise again at points below and that springs rise at different places along the course of said stream below the lands occupied by these defendants and above the ranch of the plaintiff, and that such springs furnish sufficient quantity of water which flows down to the lands of the plaintiff to supply him with sufficient water to irrigate the lands he cultivates and which are capable of irrigation, and that if the defendants are required to allow 250 inches of the waters of said Sage Creek and its tributaries to flow down past the defendant located nearest to the Wyoming line; these defendants at low stages of water in said stream would be deprived of the waters they have appropriated and which are necessary for the irrigation of their said lands, and their crops would wither and dry up, thus rendering their lands unproductive and valueless to their great and irreparable injury.

51 These defendants for further answer allege the following facts:

(a) That the jurisdiction of this Court in actions of this nature is conferred by the laws of the State of Montana; there being no National water right law, the rights of the parties must be determined under the laws of the State of Montana, and this Court has no jurisdiction to determine the right of the petitioner (plaintiff) to the use of the waters of the streams in question under the laws of the State of Wyoming.

(b) The plaintiff's bill does not show that he is a citizen of the United States, or that he has a right to appropriate the waters of streams for irrigation or other purposes, and does not show that his alleged appropriation of the waters of the streams in question was made upon the public domain.

(c) The allegations of the complaint for an injunction against

these defendants are not sworn to positively, but are sworn to upon information and belief.

(d) The value of the object to be gained by the bill of complaint, as alleged therein, does not exceed two thousand dollars (\$2,000) exclusive of interest and costs.

(e) These defendants having appropriated and diverted the waters of Sage Creek and its tributaries severally and not jointly, as shown by this answer, and each having a separate and distinct interest in the appropriation of the waters of said creek and its tributaries, each having a separate and distinct value, the Court will not aggregate such interest and values of the respective defendants for the purpose of determining the value of the plaintiff's alleged water right, in order to bring the plaintiff's claim within the jurisdiction of this Court.

(f) The Court cannot decree a water right to the plaintiff in the State of Wyoming, either under the laws of the State of Wyoming or of the State of Montana.

The defendant J. A. King, for himself alone, alleges: That in the fall of 1893 soon after he made settlement on the lands aforesaid, constructed a dam and ditch provided with headgate, for the purpose of diverting and by said means did divert and appropriate, for the purposes of irrigation on said land, 200 inches of the waters of Piney a tributary of said Sage Creek, and has ever since continuously and adversely to the plaintiff, and all other persons diverted and used said waters for the purposes hereinbefore mentioned, or so much thereof as he has been able to divert at low stages of the water in said stream.

Allen P. Graham, one of the defendants, for himself alone, alleges: That he and his predecessors in interest, long prior to the year 1901, by the construction of dam, headgate and ditch in said Sage Creek and in accordance with the laws of Montana, diverted and appropriated for the purposes aforesaid on his lands aforesaid, and has used as hereinbefore alleged, 150 inches, statutory measurement, of the waters of Sage Creek continuously and adversely to the plaintiff and to all other persons.

Michael Wrote, one of the defendants, for himself alone alleges: That in the month of October, 1892, he constructed dam, ditch and headgate as provided by the laws of Montana for diverting water, and thereby diverted and appropriated 300 inches of the waters of said Sage Creek to and upon his said land for the uses and purposes hereinbefore mentioned, and has ever since continuously and adversely to the plaintiff, and all other persons, used the said water for irrigation on his said lands, or so much thereof as he has been able to divert at low stages of said stream, and without interference with the rights of other appropriators.

William Ealy, one of the defendants for himself alleges: That in April, 1901, he constructed a dam, ditch and headgate according to the laws of the State of Montana for diverting water for irrigation purposes, and did at said time by means of said dam, ditch and headgate divert and appropriate 150 inches of the waters of said Sage Creek, and has ever since used the same for irrigation and

54 other purposes on the said lands as hereinbefore alleged adversely to the plaintiff and to such of the defendants and other persons whose rights are subsequent to his.

C. H. Young, one of the defendants, for himself alone, alleges: That he and his predecessors in interest, by means of a dam, ditch and headgate constructed under the laws of the State of Montana for the purpose of diverting water for irrigation, have used by means of such diversion 150 inches of the waters of said Sage Creek continuously and adversely to the plaintiff and all other persons not prior in right to him to the use of said waters, and have so diverted and used said waters since the year 1893 at which time his predecessor in interest appropriated and diverted said water as aforesaid for use on said lands of this defendant.

And so these defendants allege that each and all of their appropriations and use of the waters of said Sage Creek and its tributaries are prior in time and superior in right to that of the plaintiff in the use thereof.

And having thus fully made answer to said bill, these defendants pray that their and each of their rights to the use of the waters of said Sage Creek and its tributaries, be by this Honorable Court declared to be superior to the use of the waters of said stream or its tributaries by the plaintiff, and that the Court, as be-

55 tween each of these defendants, and as between them and each of the other defendants and all persons made parties to this action, decree their several rights in point of time and in quantity of water to which they may be severally entitled under the laws of the State of Montana and in accordance with equity and conscience.

O. F. GODDARD,

Solicitor for Above Answering Defendants.

O. F. GODDARD,

*Attorney for Above Answering
Defendants, Billings, Montana.*

UNITED STATES OF AMERICA,

District of Montana, County of Carbon, ss:

J. A. King, Allen P. Graham, Michael Wrote, William Ealy and C. H. Young, the persons making the foregoing answer, being each severally duly sworn, deposes and says:

That he has read the foregoing answer and that the matters and things in said answer contained which are applicable to all of these defendants are true, and each of said defendants as to the matters and things in said answer applicable to him alone are true.

MICHAEL WROTE.

J. A. KING.

ALLEN P. GRAHAM.

WILLIAM EALY.

C. H. YOUNG.

56 Subscribed and sworn to before me this 20th day of May,
A. D. 1903.

[SEAL.]

CHAS. L. MERRILL,

Notary Public in and for Carbon County, Montana.

Due service of the within answer and receipt of a true copy thereof
admitted this 22 day of May, 1903.

FRED H. HATHHORN,

Attorney for Complainant.

[Endorsed:] Title of Court and Cause. Answer of J. A. King,
Allen P. Graham, Michael Wrote, William Ealy, and C. H. Young.
Filed May 23, 1903. Geo. W. Sproule, Clerk.

57 And thereafter, to wit, on the 27th day of August, 1903,
the following minute entry was duly made and entered
herein as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of
Montana.

82d Day April Term, 1903. Thursday, August 27th, 1903.

In Open Court.

No. 666.

W. A. MORRIS

VS.

J. N. BEAN et al.

Order Granting Leave to File Bill in Intervention.

On motion of H. S. Hepner, Esq., Thos. N. Howell is granted
leave to file bill in intervention herein.

GEO. W. SPROULE, *Clerk.*

Attest a true copy of minute entry of August 27, 1903.

[SEAL.]

GEO. W. SPROULE, *Clerk,*

By C. R. GARLOW,

Deputy Clerk.

58 And thereafter, to wit, on the 5th day of September, A. D.
1903, Thomas N. Howell filed his complaint in intervention
herein, which said complaint in intervention is entered of final rec-
ord herein as follows, to wit:

In the United States Circuit Court, Ninth Circuit, District of
Montana.

In Equity.

WILLIAM A. MORRIS

VS.

J. N. BEAN, JOHN SADRING, L. O. DILTZ, ALLEN P. GRAHAM, WILLIAM ELEY, CURTIS BEELER, CHARLES INGRAM, W. R. BAINBRIDGE, C. RUNYAN, WILLIAM SHOLTZ, C. E. STEELE, BERT BENT, WALLACE BENT, JOHN RHODES, F. BANDEROF, O. S. ERICKSON, TILLMAN C. GRAHAM, JAMES PAULEY, C. M. BROWN, JOHN BOWLER, J. A. KING, A. HOLM, C. H. YOUNG, CORBETT BENNETT and MICHAEL WROTE.

Petition of Thomas N. Howell in Intervention.

To the Honorable, the Judges of the Circuit Court of the United States of America, Ninth Circuit, District of Montana:

59 Now comes Thomas N. Howell, your petitioner, and by leave of Court first had and obtained, files this his petition in intervention in the above-entitled cause, and as grounds of his intervention complains of the defendants and alleges:

1.

That your petitioner is now, and for twelve (12) years past has been, a citizen of the United States, and of the Territory, now State, of Wyoming.

2.

That J. N. Bean, John Sadring, L. O. Diltz, Allen P. Ingram, William Eley, Curtis Beeler, Charles Ingram, W. R. Bainbridge, C. Runyan, William Sholtz, C. E. Steele, Bert Bent, Wallace Bent, John Rhodes, F. Banderof, O. S. Erickson, Tillman C. Graham, James Pauley, C. M. Brown, John Bowler, J. A. King, A. Holm, C. H. Young, Corbett Bennett and Michael Wrote are now, and have been for several years last past, citizens and residents of the State of Montana.

3.

That the amount involved in this action exceeds the sum of two thousand (\$2,000.00) dollars, exclusive of interest and costs.

4.

60 That Thomas N. Howell, your petitioner, for the period of twelve years last past, has had and enjoyed the possessory right to all of the following described lands, situate in the county of Big Horn, formerly Fremont County, in the State of Wyoming, to wit:

The west half (W. $\frac{1}{2}$) of the northeast quarter (N. E. $\frac{1}{4}$), and the southeast quarter (S. E. $\frac{1}{4}$) of the northeast quarter (N. E. $\frac{1}{4}$), and the north half (N. $\frac{1}{2}$) of the southeast quarter (S. E. $\frac{1}{4}$) of

section twenty-nine (29), township fifty-seven (57) north, range ninety-seven (97) west, containing two hundred (200) acres of land according to the government survey thereof.

5.

That the said lands are agricultural and arid lands and require artificial irrigation to produce any kind of crops thereon, and that the said Thomas N. Howell, your petitioner, has occupied, farmed and used the said lands during all the time since on or about the 1st day of August, 1890, and has made final proofs on said lands in the proper land office of the United States, and has a final receiver's receipt for said lands, and is lawfully entitled to, and in good faith expects to have issued to him (your petitioner) a patent to said lands by the Government of the United States in due time.

6.

That your petitioner on or about the 1st day of August, 1890, claimed and appropriated six and one-fourth cubic feet of
61 water per second of time of the waters of Sage Creek, a tributary of the Stinkingwater River in the State of Wyoming, under and in accordance with the laws of the State of Wyoming, and on said 1st day of August, constructed the necessary dams, ditches, headgates and other appliances for diverting, conducting and measuring said quantity of water upon his said lands, and has continuously used and appropriated said quantity of water for the irrigation of said lands for the purpose of raising crops of alfalfa, and grain crops, and for other useful and beneficial purposes, except during the time and times the defendants have wrongfully deprived your petitioner of the use of said waters; and that your petitioner has no other available source of supply of water for the purpose of irrigating said lands, or for domestic purposes, or for the purpose of watering stock, than the waters of said Sage Creek and its tributaries.

7.

That said dam and ditch so constructed by your petitioner, Thomas N. Howell, tapped and diverted the waters of said Sage Creek at a point on the southwest quarter (S. W. $\frac{1}{4}$) of the south west quarter (S. W. $\frac{1}{4}$) of section eighteen (18) in township fifty-seven (57) north of range ninety-seven (97) west, in said county of Big Horn in said State of Wyoming, and the course of said ditch
62 is southeast, and conducted and carried the waters of said Sage Creek to and upon the above described lands of your petitioner; and said headgate and ditch have at all times been capable of carrying, and did carry, except as herein stated, six and one-fourth cubic feet of water per second of time of the waters of said Sage Creek; that said water right and appropriation is of the value of five thousand (\$5,000.00) dollars.

8.

That said Sage Creek has its source in the county of Carbon, in the State of Montana, and flows south for a distance of about twenty

miles, and through said county of Carbon, thence into the county of Big Horn in the State of Wyoming, to a point where the waters of said creek are diverted and appropriated by your petitioner, as aforesaid.

9.

That at all times since said 1st day of August, 1890, your petitioner has used and enjoyed the use of said six and one-fourth cubic feet of water per second of time of said waters of Sage Creek under a claim of right thereto and of prior appropriation of the same, and adversely to all and each and every other person, including each and every one of the defendants, except as hereinafter stated; and that your petitioner admits that in the year 1886, William A. Morris, a party to this action, appropriated six and one-fourth cubic feet of water per second of time of the said waters, and is
63 entitled by a priority of right to six and one-fourth cubic feet of water per second of time of the waters of said Sage Creek.

10.

That within the last past five years, the defendants settled upon the said Sage Creek and its tributaries in the said county of Carbon, in the State of Montana, and constructed dams, dikes, ditches and other obstructions in the said Sage Creek and its tributaries, and during said time, or portions thereof, and particularly during the summers of said last past two years, by means of their said dams, dikes, ditches and other obstructions placed in and about said Sage Creek and its tributaries in said county of Carbon, in said State of Montana, the defendants have diverted large quantities of the said waters of said Sage Creek and its tributaries in said county of Carbon, to and upon lands claimed and occupied by the defendants, thereby wholly depriving your petitioner from the rightful use and enjoyment of said waters, so that your petitioner has not been able to get a sufficient supply of said waters for irrigating his said crops planted and growing on his said lands, or watering stock, and that during the latter portion of the last past two irrigating seasons, or
64 summers, the defendants have diverted all of the waters of said Sage Creek, and its tributaries, from their natural course to and upon the said lands of the defendants, and said defendants have, by the means aforesaid, deprived your petitioner of all the said amount of said waters of said Sage Creek, which your petitioner had claimed and appropriated at the time herein aforesaid, and long prior to the use of said waters by the defendants, or any of them.

11.

That by reason of the wrongful diversion, taking and using of said waters by the defendants, as aforesaid, the defendants have damaged your petitioner and your petitioner has suffered damages by reason of the same, in the sum of three thousand dollars.

12.

That your petitioner is informed and believes, and therefore alleges the fact to be, that the defendants, and each of them, threaten to continue to so divert and use the said waters of said creek and its tributaries, notwithstanding the prior claims, rights and appropriation of your petitioner thereto, and in defiance of the said prior claims, rights and appropriation of your petitioner in the premises, and that unless the defendants, and each of them, are restrained from so diverting and using said waters and thus depriving your petitioner of the use and enjoyment of the same, your petitioner will suffer great and irreparable injury; and your petitioner further says he has not a plain, speedy or adequate remedy at law, and your petitioner therefore asks this Honorable Court to grant him equity in the premises.

65

13.

That your petitioner has at all times objected to and protested against said diversion of said waters by the defendants, and has at divers times, during each of said years of diversion, notified and requested said defendants, and each of them, to desist and refrain from so diverting said waters, yet the defendants have persisted and still persist in so diverting said waters as aforesaid.

Wherefore your petitioner prays this Honorable Court to grant a decree herein:

1st. That William A. Morris, one of the complainants in this action, is the owner and appropriator and entitled to the prior use and enjoyment of six and one-fourth cubic feet of water per second of time of the waters of said Sage Creek, in the county of Big Horn, in the State of Wyoming, and that such right to the use thereof is prior and superior to the right or use of the same by the defendants, and each and all of them, and prior and superior to the right or use of the same by your petitioner.

2d. That this Honorable Court also further decree herein, that your petitioner, Thomas N. Howell, is the owner and appropriator and entitled to the prior use and enjoyment of six and one-fourth cubic feet of water per second of time of the waters of said Sage Creek in the county of Big Horn, in the State of Wyoming, and that such appropriation and right to the use thereof is prior and superior to the right or use of the said waters by the defendants, and each and all of them.

3d. That your petitioner is entitled to damages in this action for said wrongful diversion of said waters of said stream in the sum of three thousand (\$3,000.00) dollars.

4th. That all of the above-named defendants, and each of them, and their agents, servants and all persons acting under or by their authority, be enjoined and restrained from in any way interfering with the flow of the water in said Sage Creek, and its tributaries, for all costs of the action, and for such other and further relief as to this Honorable Court may seem equitable and just in the premises as required by the principles of equity and good conscience.

May it please your Honor to grant unto your petitioner, a writ of subpoena of the United States of America, directed to the defendants, J. N. Bean, John Sadring, L. O. Diltz, Allen P. Graham, William Eley, Curtis Beeler, Charles Ingram, W. R. Bainbridge, C. Runyan, William Sholtz, C. E. Steele, Bert Bent, Wallace Bent, John Rhodes, F. Banderof, O. S. Erickson, Tillman C. Graham, James Pauley, C. M. Brown, John Bowler, J. A. King, A. Holm, C. H. Young, Corbett Bennett and Michael Wrote, commanding them on a day certain to appear and answer unto this petition in intervention (their verification to said answers being hereby expressly waived) and to abide and perform such order and decree in the premises as to the Court shall seem proper and required by the principles of equity and good conscience.

JAS. R. GOSS,
Solicitor for Petitioner.

STATE OF MONTANA,

County of Yellowstone, ss:

Thomas N. Howell, being first duly sworn, deposes and says: That he is a citizen of the United States, and a resident of the State of Wyoming; that he has heard read the foregoing petition and knows the contents thereof, and that the matters and things therein stated are true of his own knowledge, except the matters therein stated on his information and belief, and as to those matters, he believes it to be true, and further saith not.

THOMAS N. HOWELL.

Subscribed and sworn to before me this 11th day of August, 1903.

[SEAL.]

JAS. R. GOSS,
*Notary Public in and for the County of
Yellowstone, State of Montana.*

68

Order Allowing Intervention.

The foregoing petition in intervention having been this day presented to me in open Court, and leave asked to file the same by James R. Goss, solicitor for Thomas N. Howell, the intervener named herein, it appearing that good cause exists therefor, it is ordered that leave be, and is hereby granted to file the same, and that said Thomas N. Howell be permitted to intervene in said cause.

HIRAM KNOWLES, *Judge.*

Red Lodge, Montana, August, 1903.

Service of the foregoing petition in intervention, by a copy of the same, is hereby acknowledged, and consent given to said intervention in this cause.

GEO. W. PIERSON,
*Solicitor for Defendants J. N. Bean, W. R.
Bainbridge, Bert Bent, Wallace Bent,
and Corbett Bennett.*

BILLINGS, MONTANA, Aug. 21st, 1903.

Service of the foregoing petition in intervention, by copy of the same, is hereby acknowledged, and consent given to said intervention in this cause.

O. F. GODDARD,

Solicitor for Defendants J. A. King, Allen P. Graham, Michael Wrote, William Eley, and C. H. Young.

69

BILLINGS, MONTANA, August 19th, 1903.

Service of the within petition in intervention, by copy of the same, is hereby acknowledged, and consent given to said intervention in this cause.

FRED H. HATHORN,

Solicitor for William A. Morris, Complainant in said Cause.

[Endorsed:] Title of Court and Cause. Complaint by Thomas N. Howell as Intervener. Filed Sept. 5th, 1903. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 5th day of September, A. D. 1903, a subpoena in equity was duly issued herein, which said subpoena is entered of final record herein as follows, to wit:

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Judicial Circuit, District of Montana.

In Equity.

Subpœna on Petition in Intervention.

The President of the United States of America, Greeting, to J. N. Bean, John Sadring, L. O. Diltz, Allen P. Graham, William Eley, Curtis Beeler, Charles Ingram, W. R. Bainbridge, C. Runyan, William Sholtz, C. E. Steele, Bert Bent, Wallace Bent, John
70 Rhodes, F. Banderof, O. S. Erickson, Tillman C. Graham, James Pauley, C. M. Brown, John Bowler, J. A. King, A. Holm, C. H. Young, Corbett Bennett, & Michael Wrote, Defendants:

You are hereby commanded that you be and appear in said Circuit Court of the United States aforesaid, at the courtroom in Helena, on the 5th day of October, A. D. 1903, to answer a petition in intervention exhibited against you in said court by Thomas N. Howell, Intervener, who is a citizen of the State of Wyoming, and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit, under the penalty of five thousand dollars.

Witness, the Honorable Melville W. Fuller, Chief Justice of the

United States, this 5th day of September, in the year of our Lord one thousand nine hundred and three and of our Independence the 128th.

[SEAL.]

GEO. W. SPROULE, *Clerk.*

By ———, *Deputy Clerk.*

Memorandum Pursuant to Rule 12, Supreme Court U. S.

You are hereby required to enter your appearance in the above suit, on or before the first Monday of October, next, at the clerk's office of said Court, pursuant to said bill; otherwise the said bill be taken pro confesso.

[SEAL.]

GEO. W. SPROULE, *Clerk.*

By ———, *Deputy Clerk.*

J. R. GOSS,

Solicitor for Intervener, Billings, Montana.

[Endorsed:] No. 666. U. S. Circuit Court, Ninth Circuit, District of Montana. In Equity. Wm. A. Morris vs. J. N. Bean et al. Subpœna. Filed Sept. 19th, 1903. Geo. W. Sproule, Clerk. By ———, Deputy Clerk.

I hereby acknowledge and accept service of the within subpœna by copies of the same and copy of the petition in intervention of Thomas N. Howell, Intervener, for J. A. King, Allen P. Graham, Michael Wrote, William Ealey and C. H. Young, defendants in this action, this 9th day of September, 1903.

O. F. GODDARD,

Solicitor for Defendants J. A. King, Allen P. Graham, Michael Wrote, William Ealey and C. H. Young.

I hereby acknowledge and accept service of the within subpœna by copies of the same and copy of the petition in intervention of Bert Bent, Wallace Bent and Corbett Bennett, defendants in this action, this 12th day of September, 1903.

GEO. W. PIERSON,

Solicitor for J. N. Bean, W. R. Bainbridge, Bert Bent, Wallace Bent, and Corbett Bennett.

And thereafter, to wit, on the 19th day of September, A. D. 1903, a subpœna toties quoties was duly issued herein, which said subpœna is entered of final record herein as follows, to wit:

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Judicial Circuit, District
of Montana.

In Equity.

Subpoena Toties Quoties.

The President of the United States of America, Greeting, to J. N. Bean, John Sadring, L. O. Diltz, Allen P. Graham, William Eley, Curtis Beeler, Charles Ingram, W. R. Bainbridge, C. Runyan, Wm. Sholtz, C. E. Steele, Bert Brent, Wallace Brent, John Rhodes, F. Banderof, O. S. Erickson, Tilman C. Graham, James Pauley, C. M. Brown, John Bowler, J. A. King, A. Holm, C. H. Young, Corbet Bennett and Michael Wrote, Defendants.

73 You are hereby commanded, that you be and appear in said Circuit Court of the United States aforesaid, at the courtroom in Helena, on the 2d day of November, A. D. 1903, to answer a bill of complaint exhibited against you in said Court by Thomas N. Howell, intervener, who is a citizen of the State of Wyoming, and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit, under the penalty of five thousand dollars.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 19th day of September, in the year of our Lord one thousand nine hundred and three and of our Independence the 128th.

[SEAL.]

GEO. W. SPROULE,

Clerk.

By ———,

Deputy Clerk.

Memorandum Pursuant to Rule 12, Supreme Court U. S.

You are hereby required to enter your appearance in the above suit, on or before the first Monday of November next, at the

74 Clerk's Office of said Court, pursuant to said bill; otherwise the said bill will be taken pro confesso.

[SEAL.]

GEO. W. SPROULE,

Clerk.

By ———,

Deputy Clerk.

JAS. R. GOSS,

Solicitor for Intervener, Billings, Montana.

UNITED STATES MARSHAL'S OFFICE,

District of Montana:

I hereby certify, that I received the within writ on the 25th day of September, 1903, and personally served the same on the 30th

day of September, 1903, by delivering to and leaving with John Sadring, Charles Ingram, C. Runyan, and A. Holm, personally, near Scribner, Montana, and on C. E. Steele, O. C. Erickson, personally, near Bowler, Montana, and on L. O. Diltz, near Scribner, Montana, on the first day of October, and on John Rhodes, near Bridger, and James Pauly, at Bridger, and on T. C. Graham, 9 miles from Bridger, on the 2d day of October, and on Curtis Beeler, by leaving a copy at his residence with his sister, an adult person, near Scribner, and on C. M. Brown and B. Banderof by leaving a copy with their wives at their residences near Bowler, on the 30th day of Sept., 1903, said defendants named therein personally, at

75 —, in the county of —, in said District, a copy thereof.
Wm. Sholtz and John Bowler are not in the State of Montana.

C. F. LLOYD,

U. S. Marshal.

By C. F. GAGE,

Deputy.

[Endorsed:] No. 666. U. S. Circuit Court, Ninth Circuit, District of Montana. In Equity. Wm. A. Morris vs. J. N. Bean et al. Subpoena Toties Quoties. Filed Oct. 6th, 1903. Geo. W. Sproule, Clerk. By Fred H. Drake, Deputy Clerk.

76 And thereafter, to wit, on the 9th day of December, A. D. 1903, the answer of defendants J. N. Bean et al., was filed herein, which said answer is entered of final record herein as follows, to wit:

In the United States Circuit Court, Ninth Circuit, District of Montana,

In Equity.

WILLIAM A. MORRIS

vs.

J. N. BEAN, JOHN SADRING, L. O. DILTZ, ALLEN P. GRAHAM, WILLIAM ELEY, CURTIS BEELER, CHARLES INGRAM, W. R. BAINBRIDGE, C. RUNYAN, WILLIAM SHOLTZ, C. E. STEELE, BERT BENT, WALLACE BENT, JOHN RHODES, F. BANDEROF, O. S. ERICKSON, TILLMAN C. GRAHAM, JAMES PAULY, C. M. BROWN, JOHN BOWLER, J. A. KING, A. HOLM, C. H. YOUNG, CORBETT BENNETT and MICHAEL WROTE,

77 *The Answer of the Above-named Defendants, J. N. Bean, John Sadring, W. R. Bainbridge, Bert Bent, Wallace Bent, and Corbett Bennett, to the Petition in Intervention of Thos. N. Howell, Made Pursuant to Stipulation of Attorneys Extending Time to Answer and Expressly Waiving Answer Under Oath.*

These defendants saving and reserving unto themselves the benefit of all exceptions to the errors and imperfections in said petition of

intervention contained, for answer to so much thereof as they are advised is necessary or material for them to answer unto, do aver and say:

I. That as to whether petitioner at one time was a resident of the territory or State of Wyoming, or whether he is a citizen of the United States, defendants have not sufficient knowledge or information to form a belief as to such allegation of citizenship and residence, and therefore deny that such complainant is a citizen of the United States or was a citizen and resident of the Territory or State of Wyoming, and defendants further deny that such petitioner is now a resident of the State of Wyoming, and alleges the fact to be that he is now a resident of the State of Montana.

II. Defendants admit that they are now and have been for several years last past, citizens and residents of the State of Montana.

78 III. Defendants deny that the amount involved in this action exceeds the sum of two thousand dollars (\$2,000.00), exclusive of interest and costs.

IV. Defendants deny that for the period of twelve years last past, petitioner has had or enjoyed the possessory right to the lands described in the petition, or any part thereof.

V. Defendants deny that said lands are agricultural of character, or that they are arid, or require artificial irrigation to produce any kind of crops, and deny that the said Thos. N. Howell, the petitioner, has farmed or used the said lands during all the time since on or about the first day of August, 1890, or that he has farmed or used any of such lands at any time other than during the summer of 1898, and as to such petitioner's allegation that he has made final proof on such lands before the proper land office of the United States, and has received a final receipt for said lands, and is lawfully entitled to and expects to have issued to him a patent from the Government of the United States. These defendants, or any of them, have not sufficient knowledge or information to form a belief as to such allegations of final proof and issuance of patent, and therefore deny that said petitioner has made final proof of said lands, or is lawfully entitled to a patent of the same.

79 VI. These defendants deny that such petitioner on or about the first day of August, 1890, or at any other time claimed or appropriated six and one-fourth cubic feet of water per second of time of the waters of Sage Creek, under and in accordance with the laws of the State of Wyoming, or that he has appropriated any waters at all of such stream, that he has made no appropriation in accordance with the laws of the State of Wyoming, and deny that such petitioner on or about the said first day of August, constructed the necessary dams, ditches, headgates and other appliances for diverting, conducting or measuring said quantity of water upon his land, and deny that such petitioner constructed said ditches, dams, or headgates or other appliances, or that he ever diverted or conducted any of the waters of said Sage Creek upon the lands described in such petition at any time prior to the summer of 1898, and defendants deny that said petitioner has continuously used and appropriated such quantity of water for the irrigation of said lands for the

purpose of raising crops of alfalfa or grain crops, or for other useful or beneficial purposes, and deny that such petitioner has diverted any of the waters of said Sage Creek in excess of the quantity equaling two cubic feet per second of time of the waters of said stream, and deny that he has made such diversion continuously, or that these defendants or any of them have wrongfully deprived such petitioner of the use of the waters of Sage Creek, which he was lawfully entitled to, and deny that such petitioner has no other available source of supply of water for the purpose of
80 irrigating the lands described in the complaint, or for domestic purposes, or for the purpose of watering stock, other than the waters of Sage Creek and its tributaries.

VII. Defendants deny that the course of the ditch described in the petition is southeast, and deny that such headgate and ditch have at all times or at any time been capable of carrying or did carry six and one-fourth cubic feet of water per second of time of the waters of Sage Creek, and deny that the capacity of said headgate or ditch is or that said ditch ever conducted to said lands a quantity of water exceeding two cubic feet per second of time, and deny that such water right appropriation is of the value of five thousand dollars (\$5,000.00), or of any value exceeding five hundred dollars (\$500.00).

VIII. These defendants admit that said Sage Creek has its source in the county of Carbon, State of Montana, and that it flows south and within the county of Carbon for a distance of more than twenty miles, and thence flows into the State of Wyoming.

IX. Defendants deny that—all times since the first day of August, 1890, or at all, that said petitioner has used or enjoyed the use of said six and one-fourth cubic feet of water per second of time of the waters of Sage Creek under a claim of right thereto and of prior appropriation of same, or any less or greater amount of the
81 waters of such stream, or at all, or that he has enjoyed the use of any water of such stream under any claim of right of prior appropriation, or that he has used or diverted any of the waters of such stream adversely to these defendants or any of them, or that he has enjoyed the use of the same or any part thereof.

X. The defendants admit that they have settled upon Sage Creek and its tributaries in the county of Carbon, State of Montana, and have constructed dams, dikes, ditches, and other obstructions in said Sage Creek and its tributaries, but deny that such settlements were made within the last past five years, but allege the fact to be that they have resided on such stream for more than ten years, last past, and during such time have maintained dams, dikes, ditches and obstructions, and that they have diverted the waters of such stream and its tributaries in severalty to and upon the lands occupied by them, and deny that they have deprived such petitioner from the rightful use and enjoyment of the waters of such stream, or that complainants' priority of right of such water is prior to the rights of the appropriations of these defendants or any of them, and deny that these defendants have deprived such petitioner of any more water during the last past two irrigation seasons or summers than

they have at all times during the last past ten years and deny
82 that they have deprived such petitioner of any of the waters of Sage Creek appropriated by him as alleged in his petition, or that he appropriated any of the waters of such stream prior to the appropriation of the defendants or any of them.

XI. These defendants, and each of them, deny that by reason of the wrongful taking or using of the waters of said stream by them or any of them such petitioner has been damaged, or suffered damage, in the sum of three hundred dollars (\$300.00), or that he has been damaged in a less or greater amount, or that the petitioner has been damaged at all by reason of the acts of the defendants or any of them.

XII. Deny that these defendants have threatened to continue to divert or use the waters of the said Sage Creek or its tributaries only as they have a right to as set forth, or that any of them have threatened to divert or use, unless restrained, any of the waters of such stream which petitioner is entitled to, and deny that such petitioner will suffer great or irreparable injury if these defendants are not restrained from diverting the waters of such stream, and deny that if the petitioner has any remedy against defendants, for the cause complained of in his bill of complaint, such cause, if wrongful, cannot be redressed by an action of law.

XIII. Deny that said petitioner has at all times or at any time or at all objected to or protested against the diversion of water
83 by these defendants, or any of them, or that he has ever notified these defendants, or any of them, to desist or refrain from diverting the waters of said stream, but admit that these defendants have at all times for more than ten years, last past, diverted the waters of such stream.

As a further ground of defense, affirmative matter and cross-complaint, we, these answering defendants, say and allege, as follows:

I.

That the said defendant, J. N. Bean, is a citizen of the United States, and the county of Carbon, State of Montana, not the owner of more than one hundred sixty acres of land, and never has made any entry of agricultural lands, under the land laws of the United States, other than as herein mentioned. That on or about the 1st day of March, 1893, said defendant settled upon the southeast $\frac{1}{4}$ of the northeast $\frac{1}{4}$, and the north one-half of the southeast quarter of section thirty-six, township eight, south of range twenty-five east, M. P. M., together with forty acres of unsurveyed lands which will probably be designated as lot two of section thirty-one, township eight south of range twenty-six east, with the intention of making his homestead entry thereon, and he has so entered the surveyed portion of such tract, and intends to enter the remainder of such tract, as soon as the same is open for filing, at the local land office, and ever since such day of settlement this defendant has en-

84 joyed the exclusive occupancy, of the whole of such land. Said tract of land is one hundred and sixty acres in area, situated in the county of Carbon, State of Montana, lying riparian

to Piney Creek, a tributary of Sage Creek, mentioned in the bill of complaint, and said land is being watered, and is capable of irrigation from Piney Creek; that said land is dry and arid without artificial irrigation, but is agricultural in character with artificial irrigation, and has been made to produce, and will produce valuable crops of hay, grain and vegetables. That on or about the 29th day of June, 1893, while this defendant was so in the possession of these lands, he appropriated and diverted four cubic feet per second of time of the continuous flow of the waters of said Piney Creek, in the county of Carbon, State of Montana, for the purpose of irrigating such lands, and on or about said day posted his notice, in writing, at the intended point of diversion, of his claim of such water, and intended appropriation, and within twenty days thereafter filed his said notice of such appropriation of record in the office of the County Clerk and Recorder of Yellowstone County, the county in which said land was situated at said time, and within forty days of such day of appropriation he began the construction of a ditch, tapping said stream on its north bank, at a point of rocks near the mouth of the canyon of such stream, and prosecuted the construction of

85 said ditch with reasonable diligence, until its completion, and the same running in a westerly direction, to and upon said lands, conducting and conveying said four cubic feet per second of time of the waters of said Piney Creek, and that said appropriation and diversion was made upon the public domain, of the United States. That no other person is interested, with this defendant, in such appropriation, and that said land requires and will continue to require the whole of said water for the purpose of irrigating said lands properly, as well as to supply the needs of defendant for domestic uses of himself and family, and watering of his stock, and ever since said day of appropriation this defendant has had and enjoyed the use of all of said waters, so appropriated by him, continuously, uninterruptedly, without let or hindrance, openly and adversely to all persons, with the knowledge, and without the objection of said complainant, and is now the owner of the right to appropriate and divert, four cubic feet per second of time of the waters of Piney Creek, a tributary of Sage Creek, aforesaid, and this defendant has tilled, cultivated and seeded said lands, and has valuable crops growing thereon, and has placed valuable improvements, consisting of dwelling house, barns, stables, fences, and fruit trees, thereon, relying on his right to use the water of such stream, and that if defendant is now restrained from using the

86 waters of such stream, such lands and improvements will become valueless and wholly lost to the said defendant.

II.

That the said defendant, W. R. Bainbridge, has declared his intention to become a citizen of the United States, and is now a resident of the county of Carbon, State of Montana, and has his homestead filing, under the laws of the United States, on the southwest $\frac{1}{4}$, of the southeast $\frac{1}{4}$ of section thirty-five, township eight south, of range twenty-five east, and the northwest $\frac{1}{4}$ of the northeast $\frac{1}{4}$.

and the north $\frac{1}{2}$ of the northwest $\frac{1}{4}$ of section two, in township nine south, of range twenty-five east, M. P. M., that defendant settled upon said land on or about the 1st day of August, 1896, and ever since such day, has enjoyed the exclusive occupancy, and possession of such tract, the same being one hundred and sixty acres in area, agricultural in character, situated in the county of Carbon, State of Montana, lying riparian to Piney Creek, a tributary of Sage Creek, mentioned in the bill of complaint, all of said land being watered, and being capable of irrigation from said Piney Creek; that said land is dry and arid, without artificial irrigation, but has been made to produce and will produce valuable crops of hay, grain and vegetables, with artificial irrigation. That on or about the 15th day of September, 1899, while this defendant, was so in the possession of such land, he appropriated and diverted four
87 cubic feet per second of time of the continuous flow of the waters of said Piney Creek, in the county of Carbon, State of Montana, for the purpose of irrigating such lands, by means of a ditch, tapping such stream, on its east bank about one and one-half mile above said lands, and conveying the same to and upon said premises, and that said appropriation and diversion was made upon the public domain of the United States. That no other person is interested with this defendant, in such appropriation, and that said land requires, and will continue to require, the whole of said water, for the purpose of irrigating said lands, as well as to supply the needs of the defendant, for domestic uses for himself, and watering of his stock, and ever since said day of appropriation this defendant has had and enjoyed the use of all of said waters so appropriated by him, continuously, uninterruptedly, without let or hindrance, openly and adversely to all persons, with the knowledge and without objection of said complainant, and this defendant is now the owner of the right to appropriate and divert four cubic feet per second of time of the waters of Piney Creek, aforesaid, and has tilled, cultivated and seeded his said lands and now has valuable crops growing thereon, and has placed valuable improvements, consisting of dwelling-house, barns, stables, and fences
thereon, relying on his right to use the waters of such stream,
88 and if defendant is now restrained from using the waters of said Piney Creek, such lands and improvements will become valueless, and wholly lost to this defendant.

III.

That the said defendant Corbett Bennett, is a citizen of the United States, and a resident of the county of Carbon, State of Montana, and has his homestead filing under the laws of the United States on the northwest $\frac{1}{4}$ of the southeast $\frac{1}{4}$, and the east $\frac{1}{2}$ of the southwest $\frac{1}{4}$, and the southeast $\frac{1}{4}$ of the northwest $\frac{1}{4}$ of section seven, in township eight south of range twenty-five east, M. P. M.; the same being one hundred and sixty acres in area, situated in the county of Carbon, State of Montana, lying riparian to Sage Creek, mentioned in the bill of complaint, being watered, and is all capable of irrigation, from such stream, that said land is dry and

arid without artificial irrigation, but is agricultural in character, and with artificial irrigation has been made to produce and will produce valuable crops of hay, grain and vegetables; that on or about the 1st day of November, 1892, this defendant's predecessors in interest settled upon the aforesaid land with the intention of entering his homestead filing thereon, at the local land office, as soon as the same should be surveyed, and open for filing, and on or about the 1st day of November, 1892, in the county of Carbon,

89 State of Montana, for the purpose of irrigating the above described land, this defendant's predecessor in interest appropriated and diverted four cubic feet per second of time of the continuous flow of the waters of said Sage Creek, on the public domain, in the county of Carbon, State of Montana, for the purpose of irrigating such lands, and on or about said day posted a notice, in writing, at the intended point of diversion, of his claim of such water, and intended appropriation, and within twenty days thereafter filed his said notice of appropriation in the office of the County Clerk and Recorder of Yellowstone County, the county in which said land was situated at said time, and within forty days of such day of posting such notice commenced the construction of such ditch, tapping such stream, on its east bank at a point in the northeast $\frac{1}{4}$ of the northwest $\frac{1}{4}$ of section seven, township eight south, range twenty-five east, and prosecuted the construction of said ditch with reasonable diligence until completed, the same running in a westerly direction to and upon said land, conducting and conveying said four cubic feet per second of time of the waters of said Sage Creek, that no other person is interested with this defendant in such appropriation, and that said land requires, and will continue to require the whole of said water for the purpose of irrigating said lands, as well as to supply the needs of

90 defendant for domestic uses of himself and family, and watering of his stock, and ever since such day of appropriation this defendant has had and enjoyed the use of all of said waters so appropriated by him, continuously, uninterruptedly, without let or hindrance, openly and adversely to all persons, with the knowledge and without the objection of said complainant, and defendant is now the owner of the right to appropriate and divert four cubic feet per second of time of the waters of Sage Creek, aforesaid, and this defendant has tilled, cultivated and seeded said lands, and has valuable crops growing thereon, and has placed valuable improvements thereon, consisting of dwelling, barns, stables and fences, relying on his right to use the waters of such stream, and if defendant is now restrained from using the waters of Sage Creek, such land and improvements will become valueless, and wholly lost to this defendant.

IV.

That the defendant, Bert Bent, whose true name is S. W. Bent, is a citizen of the United States, and a resident of the county of Carbon, State of Montana, and now has his homestead entry under the laws of the United States, on the west $\frac{1}{2}$ of the southwest $\frac{1}{4}$,

the southeast quarter of the southwest $\frac{1}{4}$ of section six, and the northwest $\frac{1}{4}$ of the northeast quarter of section seven, township eight south of range twenty-five east, M. P. M. That this

91 defendant's predecessor in interest on or about the 1st day of September, 1892, settled upon said lands with the intention of entering the same under the land laws of the United States, as soon as the same should be surveyed, and open for filing, and ever since such day of settlement, this defendant and his predecessors in interest have enjoyed the exclusive occupancy thereof; Said tract of land is one hundred sixty acres in area, situated in the county of Carbon, State of Montana, lying riparian to said Sage Creek, mentioned in the bill of complaint, and is being watered, and is capable of irrigation from said stream. Said land is dry and arid without artificial irrigation, but is agricultural in character, and with artificial irrigation has been made to produce and will produce valuable crops of hay, grain and vegetables; that on or about the 28th day of October, 1892, this defendant's predecessor in interest, while in possession of said land, diverted and appropriated four cubic feet per second of time, of the continuous flow of the waters of said Sage Creek, on the public domain, in the county of Carbon, State of Montana, for the purpose of irrigating such land, and on or about said day posted his notice, in writing, jointly with the predecessors in interest of the defendant, Wallace Bent, at the intended point of diversion, of the waters of such stream, by them, of his claim of such water right, and intended appropriation, and

92 within twenty days thereafter filed his said notice of such appropriation in the office of the County Clerk and Recorder of Yellowstone County, where said land was situated at such time, and within forty days of such day of appropriation, he with the predecessors in interest of the said Wallace Bent, began the construction of a ditch, tapping said stream on its east bank about three hundred yards up and above on Sage Creek, where the Bridger road crosses said stream, and prosecuted the construction of said ditch with reasonable diligence until completion, the same running in a southeasterly direction to and upon said land of this defendant, and conducting and conveying four cubic feet per second of time of the waters of Sage Creek, to the lands of this defendant. That no other person is interested with this defendant in such appropriation and that said land requires, and will continue to require the whole of said water for the purpose of irrigating the same, as well as to supply the needs of defendant for domestic uses of himself and watering of his stock, and ever since said day of appropriation this defendant and his predecessors in interest have enjoyed the use of all the waters so appropriated, continuously, uninterruptedly, without let or hindrance, openly and adversely, to all persons, with the knowledge and without objection of said complainant, and this defendant is now the owner of the right to appropriate

93 and divert four cubic feet per second of time of the waters of Sage Creek, aforesaid, and this defendant has tilled, cultivated and seeded said lands, and has valuable crops growing thereon, and has placed valuable improvements, consisting of dwell-

ing-house, barns, stables, fences and fruit trees, relying on his right to use the waters of such stream, and that if defendant is restrained from diverting the same, such land and improvements will become valueless and wholly lost to said defendant.

V.

The defendant, Wallace Bent, is a citizen of the United States, and a resident of the county of Carbon, State of Montana, and now has his homestead entry under the laws of the United States on the west $\frac{1}{2}$ of the northeast $\frac{1}{4}$ of section six, township eight south of range twenty-five east, M. P. M., and the west $\frac{1}{2}$ of the southeast $\frac{1}{4}$ of section thirty-one, township seven south of range twenty-five east, M. P. M.; that this defendant's predecessor in interest on or about the 1st day of September, 1892, settled upon said lands with the intention of entering the same under the land laws of the United States as soon as the same should be surveyed and open for filing, and ever since such day of settlement this defendant and his predecessors in interest have enjoyed the exclusive occupancy and possession thereof. Said tract of land is one hundred sixty acres in area,

94 situated in the county of Carbon, State of Montana, lying riparian to said Sage Creek, mentioned in the bill of complaint, and is being watered, and is capable of irrigation from said stream. Said land is dry and arid without artificial irrigation, but is agricultural in character, and with artificial irrigation has been made to produce, and will produce valuable crops of hay, grain and vegetables. That on or about the 28th day of October, 1892, this defendant's predecessors in interest, while in possession of said land, diverted and appropriated four cubic feet per second of time of the continuous flow of the waters of Sage Creek, on the public domain, in the county of Carbon, State of Montana, for the purpose of irrigating such land, and posted notice of such appropriation and filed the same of record, and constructed a ditch jointly with the predecessors in interest of the said defendant S. W. Bent, in the manner alleged in the preceding paragraph, conducting and conveying four cubic feet per second of time of the waters of said Sage Creek, to and upon the lands of this defendant. That no other person is interested with this defendant in such appropriation, and that said land requires, and will continue to require the whole of said water, for the purpose of irrigating the same, as well as to supply the needs of defendant for domestic uses of himself and family, and watering of his stock, and ever since said day of appropriation this

95 defendant and his predecessors in interest have enjoyed the use of all the waters so appropriated, continuously, uninterruptedly, without let or hindrance, openly and adversely, to all persons, with the knowledge and without objection of said complainant, and this defendant is now the owner of the right to appropriate and divert four cubic feet per second of time of the waters of Sage Creek, aforesaid, and this defendant has tilled, cultivated and seeded said lands, and has shade trees and other valuable crops growing thereon, and has placed valuable improvements, consisting of dwelling-house, barns, stables, fences thereon, relying on his

right to use the waters of such stream, and that if defendant is restrained from diverting the same, such land and improvements will become valueless and wholly lost to said defendant.

VI.

That the said defendant, John Sadring, is a citizen of the United States, and the county of Carbon, State of Montana, and is now the owner of and in possession of the south $\frac{1}{2}$ of the southwest $\frac{1}{4}$ and the west $\frac{1}{2}$ of the southeast $\frac{1}{4}$ of section 34 in twp. 8 south of range 25 east, being one hundred sixty acres in area, situated in the county of Carbon, State of Montana, lying riparian to Sage Creek, mentioned in the petition of Thomas N. Howell, being watered, and is capable of irrigation from such stream, that such land is dry and arid without artificial irrigation, but is agricultural in character,

and with artificial irrigation has been made to produce and
96 will produce valuable crops of hay, grain and vegetables, that this defendant and his predecessors in interest have been in possession and entitled to possession of such land since on or about the fifteenth day of May, A. D. 1893, and that said defendant's predecessors in interest settled upon said land with the intention of entering a homestead filing thereon at the local land office as soon as same should be surveyed and open for filing, and such predecessors in interest were possessed of the right of homestead under the land laws of the United States, and of perfecting title thereto under the homestead laws, and that on or about the fifteenth day of May, 1893, after settlement made upon said lands, plaintiff's predecessors in interest appropriated and diverted four cubic feet per second of time of the continuous flow of the waters of Piney Creek, a tributary of said Sage Creek, on the public domain in the County of Carbon State of Montana, for the purpose of irrigating such lands, and on or about said day posted notices in writing at the intended point of diversion of his claim of such water and intended appropriation, and on or about said day filed his said notice of appropriation in the office of the County Clerk and Recorder of the County of Yellowstone County, in which such land was situated at said time, and on or about such time completed the construction of the ditch tapping

such stream on the north bank at about two and one-
97 fourth miles from said land at a lone cottonwood tree, said ditch leading to and upon said land conducting and conveying said four cubic feet per second of time of the waters of said Sage Creek, that no other person is interested with this defendant in such appropriation and that said land requires and will continue to require the whole of said water for the purpose of irrigating said land as well as to supply the needs of defendant for the domestic use of himself and family and the watering of his stock, and ever since said day of appropriation this defendant and his predecessors in interest have enjoyed the use of such waters so appropriated continuously, uninterruptedly, without let or hindrance, openly and adversely to all persons with the knowledge and without the objection of said petitioner, Thomas N. Howell, and defendant is now the owner of the right to appropriate and divert four cubic feet per sec-

ond of time of the waters of said Piney Creek a tributary of Sage Creek, and this defendant has tilled, cultivated and seeded his said lands, and has placed valuable improvements thereon, consisting of dwelling-house, barn, stables and fences, relying on his right to use the waters of such stream, and if said defendant is now restrained from using the waters of Sage Creek, such land and improvements will become valueless and wholly lost to this defendant.

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VII.

That said Sage Creek, mentioned in the bill of complaint, rises and has its headwaters in the State of Montana, and flows into the State of Wyoming, and the diversion of each of the defendants is made in the State of Montana, and each of these defendants have vested rights of appropriation in the waters of such stream, under the constitution and the laws of the State of Montana.

VIII.

That there has been no joint or community appropriation, use, or diversion of the waters of said stream by these defendants with any other person or persons, and that each of these defendants is possessed of his individual right in said stream, and each has for himself diverted, appropriated, and used the waters of said stream, and its tributaries, upon his individual land, independently and adversely to all other persons, particularly the petitioner, and none of such defendants diverted or appropriated six and one-fourth cubic feet per second of time of the waters of Sage Creek, and said petitioner has had and enjoyed as great a flow of the waters of such stream within the past two years as he has had at any time since any of the defendants have diverted water therefrom.

IX.

99 These defendants further say that owing to the peculiar formation and sub-stratum of the soil forming the bed of such creek, and its tributaries, the water flowing therein sinks into the sands and rises again at points below on said stream, above and below the headgate of the petitioner in such quantity as to give complainant the same supply of water that he has enjoyed at any time since any of the defendants have settled upon such stream, and each of these defendants divert the waters of said Sage Creek about forty miles above the petitioner's headgate, and if all the water of said stream were allowed to flow down to petitioner's ditch he would not receive sufficient water to irrigate his lands mentioned in the bill of complaint.

We submit that we have a right to divert the waters of Sage Creek, and that an injunction should not issue against us, and the said bill ought to be dismissed with costs.

That in the event such an injunction is granted we pray that the right of appropriation of each defendant may be defined, and that they be restrained in the order of the date of their appropriation.

GEO. W. PIERSON,

Attorney for Within Defendants.

Service of the within answer accepted this 5th day of December, 1903, expressly waiving the oath of defendants to the same.

JAS. R. GOSS,

Attorney for Petitioner, Thos. N. Howell.

100 [Endorsed:] Title of Court and Cause. Answer to Petition
in Intervention. Filed Dec. 9, 1903. Geo. W. Sproule,
Clerk.

And thereafter, to wit, on the 12th day of December, A. D. 1903, the answer of defendants J. A. King et al. was filed herein, which said answer is entered of final record herein as follows, to wit:

In the United States Circuit Court, Ninth Circuit, District of
Montana.

In Equity.

WILLIAM A. MORRIS

vs.

J. N. BEAN, JOHN SADRING, L. O. DILTZ, ALLEN P. GRAHAM, William Eley, Curtis Beeler, Charles Ingram, W. R. Bainbridge, C. Runyan, William Sholtz, C. E. Steele, Bert Bent, Wallace Bent, John Rhodes, F. Banderof, O. S. Erickson, Tillman C. Graham, James Pauley, C. M. Brown, John Bowler, J. A. King, A. Holm, C. H. Young, Corbett Bennett and Michael Wrote.

101 *The Answer of the Above-named Defendants, J. A. King, Allen P. Graham, Michael Wrote, William Eley and C. H. Young, to the Petition in Intervention of Thomas N. Howell, Made Pursuant to the Order of the Court and Stipulation Between the Attorneys Herein.*

These defendants, saving and reserving unto themselves the benefit of all exceptions to the errors and imperfections in said petition in intervention contained, for answer to so much thereof as they are advised is necessary or material for them to answer unto, do aver and say:

I. That as to whether petitioner at one time was a resident of the Territory or State of Wyoming, or whether he is a citizen of the United States, defendants have not sufficient knowledge or information to form a belief as to such allegation of citizenship and residence, and therefore deny that such complainant is a citizen of the United States or was a citizen and resident of the Territory or State of Wyoming, and defendants further deny that such petitioner is now a resident of the State of Wyoming, and allege the fact to be that he is now a resident of the State of Montana.

II. Defendants admit that they are now, and have been for several years last past, citizens and residents of the State of Montana.

III. Defendants deny that the amount involved in this action ex-

ceeds the sum of two thousand dollars (\$2,000), exclusive of interest and costs.

102 IV. Defendants deny that for the period of twelve years last past petitioner has had or enjoyed the possessory right to the lands described in the petition, or any part thereof.

V. The defendants deny each and all of the allegations contained in paragraphs 4, 5, 6 and 7 of said petition.

VI. Defendants admit all of the allegations contained in paragraph 8 of said petition, except the following portion thereof, to wit, "to that point where the waters of said creek are diverted and appropriated by your petitioner as aforesaid," which allegation the defendants deny.

VII. These defendants deny each and every allegation contained in paragraph 9 of said petition.

VIII. Answering the allegations contained in paragraph 10 of said petition, these defendants deny that within the last past five years they, or any of them, settled upon the said Sage Creek or its tributaries, but allege that they settled on said Sage Creek long prior to five years last past; and they admit that they have constructed ditches, and in some instances dams in said Sage Creek and its tributaries, and that during the last past five years, or portions thereof, they have diverted quantities of water from said Sage Creek and its tributaries in said County of Carbon to and upon the lands

103 occupied by them, as they had a right to do, but deny that such diversion and appropriation by them of the waters of said creek has wholly or at all deprived the petitioner of any rightful use or enjoyment of said waters, and as to whether or not the petitioner has been able to get a sufficient supply of said waters for irrigating his crops planted or growing on the lands described in his petition, or for watering stock, these defendants have not sufficient knowledge to enable them to answer said allegations, and therefore deny each and all of said allegations.

IX. These defendants deny that they have, during the last two irrigating seasons, or at any other time, diverted all of the waters of said Sage Creek or its tributaries from its natural course to and upon their lands, and deny that they, or any of them, have by diverting said waters or otherwise, deprived petitioner of said waters or any waters of said Sage Creek, which he claimed or appropriated as alleged in his said petition, and deny that any appropriation of said waters was made by the petitioner at any time.

X. These defendants deny each and every allegation contained in paragraph 11 of said petition, and deny that petitioner has been damaged in any sum whatever as alleged in said paragraph.

104 XI. Answering paragraph 12 of said petition, these defendants deny that they, or any of them, threaten to continue to divert or use the waters of said Sage Creek or its tributaries, notwithstanding the prior rights or appropriations of the petitioner thereto, or in defiance of his prior rights, claim or appropriations on the premises, and deny that unless these defendants, or any of them, are restrained from diverting and using the waters of said Sage Creek the petitioner will suffer great or irreparable injury, and

deny that the petitioner has not a plain, speedy or adequate remedy at law to enforce his rights to the waters mentioned in his petition, if any such rights he has.

Further answering the said petition the defendants allege:

1. That they are each citizens of the United States and citizens and residents of the county of Carbon, State of Montana, and have each settled upon, improved and occupied, and are now in possession of, improving and farming, 160 acres of unappropriated government land of the United States in the valley of and riparian to the said Sage Creek and its tributaries, which said Sage Creek rises and has its source in the Pryor Mountains in the State of Montana, and flows in a southerly direction into the State of Wyoming.

2. That long prior to the commencement of this action each of these defendants, and his predecessors in interest, appropriated, diverted and used for irrigation purposes on their said lands the waters 105 of said Sage Creek and its tributaries, and that said lands have at all times been, and are now, arid, requiring irrigation to produce any kind of crops thereon, and that the appropriation and use of the waters of the said Sage Creek and its tributaries by each of these defendants and his predecessor, as hereinafter particularly set forth, has been enjoyed continuously and adversely to the petitioner and with the knowledge and consent of the petitioner, and without objection or protest by him prior to the commencement of this action, and that the waters so appropriated and used by each of these defendants and his predecessors have been necessary, proper and useful as to quantities and times for the irrigation of their said lands and for domestic purposes, and that said use of said waters for said purposes will continue in the future, and that said lands without the use of said waters as aforesaid are and will be of little or no value, and that the defendants could not successfully farm said lands or sustain themselves and their families thereon without such use of said waters as aforesaid.

3. That the said lands of these defendants, and each of them, are riparian to said stream and subject to and capable of irrigation from its waters, and that each of these defendants have the right to use and are the owners of the appropriation of said waters so used and to 106 be used by them as aforesaid, adversely and prior to the use of the same by the petitioner under the constitution and laws of the State of Montana.

4. Defendants further allege that there has been no joint or community appropriation or use of the waters of said streams, or any of them, by these defendants or any two or more of them, and that each of these defendants is possessed of and entitled to possess and use his individual water right from said stream and its tributaries and has each for himself individually diverted, appropriated and used the waters of said stream and its tributaries upon his own individual land independently and adversely to each of his codefendants and all other persons.

These defendants for further answer allege the following facts:

(a) That the jurisdiction of this Court in actions of this nature is conferred by the laws of the State of Montana; there being no na

tional water-right law, the rights of the parties must be determined under the laws of the State of Montana, and this Court has no jurisdiction to determine the right of the petitioner to the use of the water of the streams in question under the laws of the State of Wyoming.

(b) The value of the object to be gained by the petition, as alleged therein, does not exceed two thousand dollars (\$2,000.00) exclusive of interest and costs.

107 (c) These defendants having appropriated and diverted the waters of Sage Creek and its tributaries severally and not jointly, as shown by this answer, and each having a separate and distinct interest in the appropriation of the waters of said Sage Creek and its tributaries, each having a separate and distinct value, the Court will not aggregate such interest and values of the respective defendants for the purpose of determining the value of the petitioner's alleged water right, in order to bring the petitioner's claim within the jurisdiction of this Court.

(d) The Court cannot decree a water right to the petitioner in the State of Wyoming, either under the laws of the State of Wyoming or of the State of Montana.

The defendant J. A. King, for himself alone, alleges: That in the fall of 1893, soon after he made settlement on the lands aforesaid, he constructed a dam and ditch provided with headgate for the purpose of diverting, and by said means did divert and appropriate, for the use of irrigation on said land, 200 inches of the water of Piney, a tributary of said Sage Creek, and has ever since continuously and adversely to the petitioner and all other persons, diverted and used said waters for the purposes hereinbefore mentioned, or so much thereof as he has been able to divert at low stages of the water in said stream

108 Allen P. Graham, one of the defendants, for himself alone alleges:

That he and his predecessors in interest, long prior to the year 1901, by the construction of a dam, headgate and ditch in said Sage Creek, and in accordance with the laws of Montana, diverted and appropriated for the purposes aforesaid on his lands aforesaid, and has used as hereinbefore alleged, 150 inches, statutory measurement, of the waters of Sage Creek continuously and adversely to the petitioner and to all other persons.

Michael Wrote, one of the defendants, for himself alone alleges:

That in the month of October, 1892, he constructed a dam, ditch and headgate as provided by the laws of Montana for diverting water, and thereby diverted and appropriated 300 inches of the waters of said Sage Creek to and upon his said land for the uses and purposes hereinbefore mentioned, and has ever since continuously and adversely to the petitioner and all other persons, used the said water for irrigation on his said lands, or so much thereof as he has been able to divert at low stages of said stream, and without interference with the rights of other appropriators.

William Eley, one of the defendants, for himself alone alleges:

109 That in April, 1901, he constructed a dam, ditch and headgate according to the laws of the State of Montana for diverting water for irrigation purposes, and did at said time by means of said dam, ditch and headgate divert and appropriate 150 inches of the waters of said Sage Creek, and has ever since used the same for irrigation and other purposes on the said lands as hereinbefore alleged, adversely to the petitioner and to such of the defendants and other persons whose rights are subsequent to his.

C. H. Young, one of the defendants, for himself alone alleges:

That he and his predecessors in interest, by means of a dam, ditch and headgate constructed under the laws of the State of Montana for the purpose of diverting water for irrigation, have used by means of such diversion 150 inches of the waters of said Sage Creek continuously and adversely to the plaintiff and all other persons not prior in right to him to the use of said waters, and have so diverted and used said waters since the year 1893, at which time his predecessor in interest appropriated and diverted said water as aforesaid for use on said lands of this defendant.

And so these defendants allege that each and all of their appropriations and use of the waters of said Sage Creek and its tributaries are prior in time and superior in right to that of the petitioner in the use thereof.

110 And having thus fully made answer to said petition, these defendants pray that their and each of their rights to the use of the waters of said Sage Creek and its tributaries, be by this Honorable Court declared to be superior to the use of the waters of said stream or its tributaries by the petitioner, and that the Court, as between each of these defendants, and as between them and each of the other defendants and all persons made parties to this action, decree their several rights in point of time and in quantity of water to which they may be severally entitled under the laws of the State of Montana and in accordance with equity and conscience.

O. F. GODDARD,

Solicitor for Above Answering Defendants.

O. F. GODDARD,

Attorney for Above Answering Defendants, Billings, Montana.

UNITED STATES OF AMERICA.

District of Montana, County of Carbon, ss:

J. A. King, Allen P. Graham, Michael Wrote, William Eley and C. K. Young, the parties making the foregoing answer, being each severally duly sworn, deposes and says:

That he has read the foregoing answer and that the matters and things in said answer contained which are applicable to all
111 of these defendants are true, and each of said defendants, as to the matters and things in said answer applicable to him alone, says the same are true.

Subscribed and sworn to before me this — day of December, 1903.

Notary Public in and for Carbon County, Montana.

Due service of within answer and receipt of a true copy thereof admitted this 11th day of December, 1903.

JAS. R. GOSS,
Attorney for Thos. N. Howell, Intervener.

[Endorsed:] Title of Court and Cause. Answer of Certain Defendants to Petition in Intervention. Filed Dec. 12th, 1903. Geo. W. Sproule, Clerk.

112 And thereafter, to wit, on the 12th day of January, A. D. 1904, the intervener filed his replication to the answer of J. A. King et al. herein, which said replication is entered of final record herein as follows, to wit:

In the United States Circuit Court, Ninth Circuit, in and for the District of Montana,

In Equity.

WILLIAM A. MORRIS

vs.

J. N. BEAN, JOHN SADRING, L. O. DILTZ, ALLEN P. GRAHAM, WILLIAM ELEY, CURTIS BEELER, CHARLES INGRAM, W. R. BAINBRIDGE, C. RUNYAN, WILLIAM SHOLTZ, C. E. STEELE, BERT BENT, Whose True Name is S. W. Bent; WALLACE BENT, JOHN RHODES, F. BANDERHOFF, C. S. ERICKSON, TILLMAN C. GRAHAM, JAMES PAULEY, C. M. BROWN, JOHN BOWLER, J. A. KING, A. HOLM, C. H. YOUNG, CORBETT BENNETT, and MICHAEL WROTE.

113 *Replication of Thomas N. Howell, Intervener, to Answer of Defendants J. A. King et al.*

The replication of Thomas N. Nowell, intervener, saving and reserving to himself all and all manner of advantage of exception, which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendants, J. A. King, Allen P. Graham, Michael Wrote, William Eley, and C. H. Young, for replication thereunto, saith, that he doth and will ever, maintain, and prove his said petition and bill of complaint, to be true, certain and sufficient in law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive, and insufficient in law, to be replied to by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied to and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repli-

cant is ready to aver, maintain and prove as this Honorable Court shall direct, and humbly prays as in his said petition and bill of complaint he hath already prayed.

JAS. R. GOSS,
Petitioner's Solicitor.

114 [Endorsed:] Title of Court and Cause. Replication of Thomas N. Howell, Intervener, to Answers of J. A. King, Allen P. Graham, Michael Wrote, William Eley, and C. H. Young. Service of the within replication by copy acknowledged this 31st day of December, 1903. — — —, Attorney for the Above named Defendants. O. F. Goddard, Petitioner's Solicitor. Filed and Entered Jan. 12, 1904. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 12th day of January, A. D. 1904, the intervener filed his replication to the answer of defendants J. N. Bean et al., herein, which said replication is entered of final record herein as follows, to wit:

115 In the United States Circuit Court, Ninth Circuit, in and for the District of Montana.

In Equity.

WILLIAM A. MORRIS

vs.

J. N. BEAN, JOHN SADRING, L. O. DILTZ, ALLEN P. GRAHAM, WILLIAM ELEY, CURTIS BEELER, CHARLES INGRAM, W. R. BAINBRIDGE, C. RUNYAN, WILLIAM SHOLTZ, C. E. STEELE, BERT BENT, WHOSE TRUE NAME IS S. W. BENT; WALLACE BENT, JOHN RHODES, F. BANDEROFF, O. S. ERICKSON, TILLMAN C. GRAHAM, JAMES PAULEY, C. M. BROWN, JOHN BOWLER, J. A. KING, A. HOLM, C. H. YOUNG, CORBETT BENNETT, and MICHAEL WROTE.

Replication of Thomas N. Howell to Answer of Defendants J. N. Bean et al.

The replication of Thomas N. Howell, intervener, saving and reserving to himself all and all manner of advantage of exception, which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendants, J. N. Bean, John Sadring, W. R. Bainbridge, S. W. Bent, Wallace Bent and Corbett Bennett, for replication thereunto, saith, that he doth and will aver, maintain, and prove his said petition and bill of complaint to be true, certain and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive, and insufficient in law, to be replied to by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied,

is true; all which matters and things this replicant is ready to aver, maintain, and prove as this Honorable Court shall direct, and humbly prays as in and by his said petition and bill of complaint he hath already prayed.

JAS. R. GOSS,
Petitioner's Solicitor.

Due service of the within replication and receipt of a true copy thereof admitted this 31st day of December, 1903.

GEO. W. PIERSON,
*Attorney for Def'ts Bean, Bennett, Bent,
Bainbridge, and Sadring.*

117 [Endorsed:] Title of Court and Cause. Replication of Thomas N. Howell, Intervener, to Answers of J. N. Bean, John Sadring, W. R. Bainbridge, S. C. Bent, Wallace Bent, and Corbett Bennett. Filed and entered Jan. 12, 1904. Geo. W. Sproule, Clerk. Service accepted.

And thereafter, to wit, on the 5th day of February, A. D. 1904, the complainant filed his replication to the answer of defendants J. N. Bean et al. herein, which said replication is entered of final record herein as follows, to wit:

In the United States Circuit Court, Ninth Circuit, District of
Montana.

In Equity.

WILLIAM A. MORRIS

vs.

J. N. BEAN, JOHN SADRING, L. O. DILTZ, ALLEN P. GRAHAM, WILLIAM ELEY, CURTIS BEELER, CHARLES INGRAM, W. R. BAINBRIDGE, C. RUNYAN, WILLIAM SHOLTZ, C. E. STEELE, BERT BENT, WALLACE BENT, JOHN RHODES, F. BANDEROF, O. S. ERICKSON, TILLMAN C. GRAHAM, JAMES PAULEY, C. M. BROWN, JOHN BOWLER, J. A. KING, A. HOLM, C. H. YOUNG, CORBETT BENNETT, and MICHAEL WROTE.

118 *Replication of Complainant William A. Morris to Answer of Defendants J. N. Bean et al.*

The replication of William A. Morris, saving and reserving to himself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the defendants, J. N. Bean, W. R. Bainbridge, Bert Bent, Wallace Bent, and Corbett Bennett, for replication thereunto saith:

That the complainant will ever maintain and prove his said bill to be true, certain and sufficient in the law to be answered unto by said defendants and that the answer of said defendants is very uncertain, evasive and insufficient in the law to be replied unto by

this replicant, without that that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, confessed or avoided or denied is true; and all matters and things this replicant is ready to aver, maintain and prove as this Honorable Court may direct and humbly as in and by his said bill he has already prayed.

FRED H. HATHHORN,
Solicitor for William A. Morris, Complainant.

119 Due and legal service together with a copy of the foregoing replication is hereby admitted and accepted by me this 30th day of January, A. D. 1904.

GEO. W. PIERSON,
Solicitor for Defendants J. N. Bean, W. R. Bainbridge, Bert Bent, Wallace Bent, and Corbett Bennett.

[Endorsed:] Title of Court and Cause. Replication. Filed and entered Feb. 5, 1904. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 5th day of February, A. D. 1904, the complainant filed his replication to the answer of defendants J. A. King et al., herein, which said replication is entered of final record herein as follows, to wit:

120 In the United States Circuit Court, Ninth Circuit, District of Montana.

In Equity.

WILLIAM A. MORRIS

vs.

J. N. BEAN, JOHN SADRING, L. O. DILTZ, ALLEN P. GRAHAM, William Eley, Curtis Boeler, Charles Ingram, W. R. Bainbridge, C. Runyan, William Sholtz, C. E. Steele, Bert Bent, Wallace Bent, John Rhodes, F. Banderof, O. S. Erickson, Tillman C. Graham, James Pauley, C. M. Brown, John Bowler, J. A. King, A. Holm, C. H. Young, Corbett Bennett, and Michael Wrote.

Replication of Complainant William A. Morris to Answer of J. A. King et al.

The replication of William A. Morris saving and reserving to himself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the defendants, J. A. King, Allen P. Graham, Michael Wrote, William Eley, and C. H. Young, for replication thereunto saith:

That the complainant will ever maintain and prove his said bill to be true, certain and sufficient in the law to be answered unto by said defendants and that the answer of said defendants is very un-

certain, evasive and insufficient in the law to be replied unto by this replicant, without that that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, confessed or avoided or denied is true; and all matters and things this replicant is ready to aver, maintain and prove as this Honorable Court may direct and humbly as in and by his said bill he has already prayed.

FRED H. HATHHORN,

Solicitor for William A. Morris, Complainant.

Due and legal service together with a copy of the foregoing replication is hereby admitted and accepted by me this 27th day of January, A. D. 1904.

O. F. GODDARD,

Solicitor for Defendants J. A. King, Allen P. Graham, Michael Wrote, William Eley, and C. H. Young.

[Endorsed:] Title of Court and Cause. Replication. Filed and entered Feb. 5, 1904. Geo. W. Sproule, Clerk.

122 And thereafter, to wit, on the 10th day of July, A. D. 1905, an order pro confesso was duly made and entered herein, as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

No. 666.

WM. A. MORRIS, Complainant,

vs.

J. N. BEAN et al., Defendants.

Order Taking Bill of Complaint Pro Confesso.

On filing due proof of personal service of the subpoena issued in this cause on L. O. Diltz, Curtis Beeler, Charles Ingram, C. Runyan, Wm. Sholtz, C. E. Steele, John Rhodes, F. Banderof, O. S. Erickson, Tilman C. Graham, James Pauley, and C. M. Brown, certain of the defendants herein, twenty days before the return day thereof, and the said defendants, or either of them, having failed to appear, plead or answer within the time limited and prescribed by the rules and practice of this court, on motion of Messrs. McConnell &

123 McConnell, solicitors for the complainant, it is ordered that the bill of complaint filed in this cause be, and the same is hereby taken as confessed by said defendants and each of them.

Entered July 10, 1905.

GEO. W. SPROULE, *Clerk.*

By C. R. GARLOW,

Deputy Clerk.

Attest a true copy.

[SEAL.]

GEO. W. SPROULE, *Clerk.*

By C. R. GARLOW,

Deputy Clerk.

And thereafter, to wit, on the 10th day of August, A. D. 1905, the Master in Chancery filed his report herein, which said report is entered of final record herein as follows, to wit:

124 In the Circuit Court of the United States, Ninth Circuit,
in and for the District of Montana.

In Equity. No. 666.

W. A. MORRIS, Complainant,

vs.

J. N. BEAN, JOHN SADRING, L. O. DILTZ, ALLEN P. GRAHAM, WILLIAM ELEY, CURTIS BEELER, CHARLES INGRAM, W. R. BAINBRIDGE, C. RUNYAN, WILLIAM SHOLTZ, C. E. STEELE, BERT BENT, WALLACE BENT, JOHN RHODES, F. BANDEROF, O. S. ERICKSON, TILLMAN C. GRAHAM, JAMES PAULEY, C. M. BROWN, JOHN BOWLER, J. A. KING, A. HOLM, C. H. YOUNG, CORBETT BENNETT, and MICHAEL WROTE, Defendants;
T. N. HOWELL, Intervener.

Report of Master in Chancery.

To the Honorable Judges of said Court:

I, Oliver T. Crane, standing Master in Chancery of said Court, do respectfully report:

125 That pursuant to an order of reference heretofore made and entered in said cause, by said Court on the seventh day of June, A. D. 1905, whereby it was referred to me as such Master to hear said cause, and report to the Court my findings of fact and conclusions of law therein: I was, on the eighth, ninth and tenth days of June A. D. 1905, attended at my chambers in the city of Butte, in the county of Silver Bow, State of Montana, by N. W. McCONNELL, Esq., solicitor for complainant, James R. GOSS, Esq., solicitor for intervener, and George W. PEARSON, Esq., and O. F. GODDARD, Esq., solicitors for certain of the defendants.

That the said solicitors then and there offered in evidence and submitted to me the several pleadings, and the testimony in the form of depositions that had been heretofore — taken herein, and all the exhibits and instruments in writing herein.

That after having duly considered the pleadings in said cause, and all the evidence introduced before me as aforesaid, and after having heard the arguments of counsel, and made an examination of the briefs filed on the part of the complainant, the intervener, and part of the defendants, I make the following findings of fact, to wit:

Findings of Fact of Master in Chancery.

1. That Sage Creek is a natural watercourse, having its source in the Pryor Mountains, Carbon County, State of Montana,
126 flowing in a general southerly direction, in its natural channel, through a portion of said Carbon County, State of

Montana, to the dividing line between the States of Wyoming and Montana, and from thence on into the said State of Wyoming, and emptying into the Stinkingwater River.

2. That the complainant, William A. Morris, was at the time of the commencement of this suit, and is now, a citizen of the United States, and a citizen and resident of the State of Wyoming.

3. That the complainant, William A. Morris, is the owner of, and in possession of, and was at the time of the commencement of this suit in the possession of the land situated in the State of Wyoming, and described in paragraph 4 of the bill of complainant, to wit:

All of the southwest quarter (S. W. $\frac{1}{4}$) of the southeast quarter (S. E. $\frac{1}{4}$), and the east half (E. $\frac{1}{2}$) of the southwest quarter (S. W. $\frac{1}{4}$) of section thirty (30), and the northeast quarter (N. E. $\frac{1}{4}$) of the northwest quarter (N. W. $\frac{1}{4}$) of section thirty-one (31) in township fifty-eight (58) north of range ninety-seven (97) west, containing one hundred and sixty (160) acres of Government lands, according to the Government survey thereof, situate in the counties of Fremont and Big Horn in the Territory and State of Wyoming.

127 4. That the said Sage Creek flows in its natural channel through the said lands of the said complainant, William A. Morris.

5. That the said lands of the said complainant, William A. Morris, were taken up by the said Morris, as a homestead, in the year 1887, and were and are agricultural lands, and are arid, requiring irrigation to make them produce good crops; that the complainant, William A. Morris, for the purpose of irrigating said lands, attempted to appropriate a water right, to wit, on the — day of April, 1887, constructed a dam in said Sage Creek at a point within the limits of the then Territory of Wyoming, and conducted water through a ditch onto his said lands; that the point of diversion of said water was one-half mile from where the ditch entered his lands. That the said complainant, William A. Morris, used the water so attempted to be appropriated by him, upon his said lands from the year 1887 to the year 1894, when the flow of water was interrupted by the appropriations and use of the waters of Sage Creek aforesaid, by the defendants, in the State of Montana.

6. That the complainant, William A. Morris, in his said attempted appropriation of water from Sage Creek, never has complied with the requirements of the laws of the State of Wyoming, governing the appropriation of water, and the acquisition of water rights therein.

128 7. That under the laws of the State of Wyoming there does not exist in that State, as incident to the ownership of riparian soil, any common-law riparian rights.

8. The intervener, T. N. Powell, is the owner of and in possession of, and was in possession of at the time of the commencement of this action the lands described in paragraph IV of his complaint in intervention, to wit: The west half of the northeast quarter and the southeast quarter of the northeast quarter and the north

half of the southeast quarter of section 29, township 57 north, range 97 west, containing two hundred acres; that he went into possession of said lands in the summer of 1890, and has been in possession of the same ever since up to the present time; that he has a receiver's receipt for a patent for these lands.

9. That said lands of T. N. Howell are agricultural lands, and are arid, requiring irrigation to make them produce crops.

10. That the intervener, T. N. Howell, made an appropriation out of Sage Creek in the State of Wyoming, by placing a dam in said creek and constructing a ditch therefrom five feet on the bottom, six feet on top, 16 inches deep, having a uniform grade of one quarter of an inch to the rod. The point of diversion in said creek is one and one-half miles from the place of use by means of said dam and ditch, diverting water from said stream, and carrying the same to and upon his said lands; that said ditch has a capacity of 13-7/10 cubic feet per second, or 548 miners' inches.

11. That the intervener, T. N. Howell, in making said appropriation of water from Sage Creek, in the State of Wyoming, did comply with the provisions of the laws of Wyoming governing the appropriation and use of water in said State.

12. That the value of said water right of said T. N. Howell is the sum of \$2,200.00.

13. That the said T. N. Howell commenced the construction of his dam and ditch on the first day of August, 1890, and finished the same during the month of August, 1890; that he turned the water in the following spring and conducted the same through said ditch to and upon his said ranch and used the same for irrigating the crops thereupon.

14. That said T. N. Howell has had part of his land in grain, alfalfa and timothy. The first year he cultivated and sowed forty acres of alfalfa; that he increased this from year to year, sowing as high as seventy acres of alfalfa at one time, besides cultivating upon the same crops of grain, oats and wheat; that he has been in the possession of said land since the summer of 1890 up to the present time; that he cultivated his land in 1891, 1892, and 1893, raising good crops; that in 1894, 1895, 1896, he sowed crops,

but failed to raise any by reason of the fact that the defendants deprived him of water so that his crops dried up and perished.

15. That he never abandoned his said ranch nor the use of water thereon voluntarily from the time he first made his appropriation up to the time of the commencement of this law suit, but that he was forced to discontinue the use of water after 1894 by reason of the fact that he could not get the water, the same having been appropriated and used by the defendants in the State of Montana.

16. That the defendants had due and timely notice after they commenced the use of water under their appropriations in the State of Montana of the claim of the intervener, T. N. Howell, to the waters of Sage Creek, as hereinafter set forth in these findings; that said intervener's appropriation as set forth in these findings is

prior in time to any and all of the appropriations made by any of the defendants; that the same was made at a time when all of the territory tributary to the waters of Sage Creek and its tributaries was a part of the Crow Reservation.

17. That the water does not sink by reason of quicksands during the irrigating seasons between the mouth of Piney Creek and the lands described in these findings of the said T. N. Howell, but that the same would reach intervener's lands if allowed to flow down to him by the defendants.

18. That the plaintiff has been damaged by reason of the loss of water in the sum of \$2,500.00.

131 19. That 110 inches of water, miner's measure, is necessary for the proper irrigation of said lands of T. N. Howell.

20. The intervener, T. N. Howell, did not abandon or cease to use the waters of Sage Creek for any two consecutive years since the date of his appropriation voluntarily, but was compelled to cease the use of said water for several years before the filing of his complaint in intervention by reason of the fact that the defendants deprived him of the water.

21. That the intervener, T. N. Howell, has suffered no damage to his rights, inflicted by the defendants jointly.

22. That all of the defendants herein are citizens of the State of Montana, and the matters set forth in their cross-bill are foreign to the subject matter of the controversy between the complainant and the intervener and the defendants.

Conclusions of Law of Master in Chancery.

1. That the complainant, William A. Morris, never has acquired a water right in the waters of Sage Creek, under the laws of the Territory or State of Wyoming as against the defendants to this suit, and that he has no interest or rights in or to the waters of Sage Creek, paramount or superior to those of the defendants in this suit, and therefore has no cause of action as against the defendants, and is not entitled to any relief in this suit.

132 2. That the intervener, T. N. Howell, made a valid appropriation under the laws of Wyoming, and is the lawful owner of 110 inches of the waters of Sage Creek, and has been, ever since the 1st day of August, 1890, and was so the lawful owner of the same on the 5th day of September, 1903, at the date of the filing of his complaint in intervention.

3. That none of the defendants are entitled, as against the intervener T. N. Howell, to any of the waters of Sage Creek, by virtue of the Statute of Limitations of ten years.

4. The statute of Wyoming declaring the failure to use waters appropriated from streams of that State for two consecutive years works an abandonment of the right acquired by virtue of such appropriation has no application to the claim of T. N. Howell under the facts found in this case.

5. That under the laws of the State of Wyoming there is no such thing as riparian rights, and it was not necessary for said

intervener to aver and prove that he made his appropriation on the public domain or acquire the right from the private riparian owner.

6. T. N. Howell having commenced his dam and ditch in the month of August, 1890, and turned the water in through the same and used it upon his premises in the spring of 1891, made an appropriation of date the first of August, 1890, and he was not required to comply with the law of December 22, 1890, in order to acquire a valid water right.

7. The jurisdiction of the United States Circuit Court does not depend upon the citizenship of the intervener Howell, but upon the citizenship of the plaintiff, W. A. Morris.

8. The intervener Howell having made an appropriation in the State of Wyoming prior to any of the appropriations made by any of the defendants in the State of Montana is entitled to have enough water allowed by the defendants to flow down to his premises to supply his said right, and the appropriations of the defendants are all held subject to and subordinate to the said right of the intervener Howell.

9. That the intervener T. N. Howell is not entitled to recover any damages against the defendants, or any of them in this suit. (Blaisdell vs. Stephens, 14 Nevada 22; opinion of Judge Knowles on application for an interlocutory injunction herein filed May 5, 1903.)

10. That under the pleadings and facts in this suit, this Court has no jurisdiction to determine the defendants' controversies inter sese, as to their priorities or rights in and to the waters of Sage Creek.

(Vannerson vs. Leverett, 31 Fed. 376; Weaver vs. Alter et al., 3 Woods 152, Federal Cases 17308.)

All of which is respectfully submitted.

OLIVER T. CRANE,
Standing Master in Chancery.

Dated Helena, Montana, August 10, 1905.

Master's fee for eight days spent in the business of the reference. \$160.00.

OLIVER T. CRANE,
Standing Master in Chancery.

[Endorsed:] Title of Court and Cause. Report of Master. Filed and Entered Aug. 10, 1905. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 10th day of August, A. D. 1905, the exceptions of the complainant to the report of the Master were filed herein, which said exceptions are entered of final record herein as follows, to wit:

135 In the Circuit Court of the United States, Ninth Circuit,
District of Montana.

W. A. MORRIS, Complainant,

vs.

J. N. BEAN et al., Defendants; T. N. HOWELL, Intervener.

Exceptions of Complainant to Report of Master in Chancery.

The complainant, W. A. Morris, excepts to so much of the report made by Oliver T. Crane, standing Master in Chancery, to whom this cause was referred on the 7th day of June, 1905, as follows:

I. For that the said Master in his said findings of fact finds:

"That the complainant, William A. Morris, in his said attempted appropriation of water from Sage Creek, never has complied with the requirements of the laws of the State of Wyoming covering the appropriation of water and the acquisition of water rights therein."

Whereas, the said Master should have found that the com-
136 plainant, W. A. Morris, on the — day of April, 1887, made an appropriation out of Sage Creek, in the State of Wyoming by placing a dam in said creek and constructing a ditch two feet wide on the bottom, three feet on top and twenty inches deep, with a uniform grade of eighteen or twenty feet to the mile, and thereby diverted the water from said Sage Creek through said ditch and carried the same to, on and upon his said lands; that said ditch is capable of carrying 14.6 cubic feet per second, equal to 584 miner's inches.

[Refused.—Oliver T. Crane, Master in Chancery.]

II. For that the said Master in his said report finds:

"That the complainant, William A. Morris, for the purpose of irrigating said lands attempted to appropriate a water right, to wit, on the — day of April, 1887."

Whereas the said Master should have found that the complainant, William A. Morris, for the purpose of irrigating his lands did make an appropriation of the waters of Sage Creek, to wit, on the — day of April, 1887.

[Refused.—Oliver T. Crane, Master in Chancery.]

III. For that the said Master in his said report finds:

137 "That the said complainant, William A. Morris, used the water so attempted to be appropriated by him upon his said lands from the year 1887 to the year 1894, when the flow of water was interrupted by the appropriation and use of the waters of Sage Creek aforesaid by the defendants in the State of Montana."

Whereas the said Master should have found that the complainant, William A. Morris, by virtue of his appropriation from Sage Creek had plenty of water each year from 1887 up to 1894; that his first shortage was in 1894, and after that he had water enough from his appropriation from Sage Creek to raise a full crop of alfalfa for the first crop, and a half a crop the second crop, but by reason of the shortage of water he could not raise a third crop, as he had been accustomed to before 1894.

[Refused.—Oliver T. Crane, Master in Chancery.]

IV. For that the Master in his said report fails, neglects and refuses to find the following facts as requested by the complainant, William A. Morris:

1. That the value of the water right of the complainant, William A. Morris, is the sum of \$3,200.00.

2. That the complainant, William A. Morris, cultivated the first year after he had so appropriated his water, eight acres of oats, six acres of corn and two or three acres of garden, and irrigated
138 for hay about twenty or twenty-five acres and in succeeding years kept increasing the area in cultivation for four or five years, when he had in about one hundred acres of alfalfa and grain; that he irrigated the whole one hundred and sixty acres for pasture and hay and grain; said land is all good, very productive and lies level.

3. That the shortage of water from 1894 to the time suit was commenced was owing to the use of water by the defendants and thereby depriving the said complainant, William A. Morris, of said water.

4. That the defendants had due and timely notice after they commenced the use of water under their appropriations in the State of Montana of the claims of the complainant, William A. Morris, to the waters of said Sage Creek, and that complainant's appropriation was prior in time to any and all of the appropriations made by the defendants.

5. That said William A. Morris used water upon his said lands from Sage Creek each and every year from the date of his appropriation in April, 1887, up to the time of the commencement of this suit.

6. That the water does not sink by reason of quicksands during the irrigating season between the mouth of Piney Creek and the lands of the complainant, William A. Morris, but that the same would reach complainant's lands if allowed to flow down to him by
the defendants.

139 7. That the complainant has been damaged by reason of the loss of water on account of the use of the same by the defendants in the sum of \$2500.00.

8. That one hundred and sixty inches of water, miner's measure, is necessary for the proper irrigation of said lands of said William A. Morris.

9. That the complainant, William A. Morris, never voluntarily abandoned or ceased to use the waters of Sage Creek for any two consecutive years since the date of his appropriation in April, 1887, but was compelled to cease to use said water for several years before the filing of this complaint by reason of the fact that the defendants deprived him of water.

[Refused.—Oliver T. Crane, Master in Chancery.]

And the complainant, William A. Morris, excepts to the conclusions of law made by the standing Master in Chancery as follows:

1. For that the said Master in his conclusions of law finds:

"That the complainant, William A. Morris, never has acquired a water right in the waters of Sage Creek under the laws of the Ter

ritory or State of Wyoming as against the defendants to this suit, and that he has no interest or rights in or to the waters of Sage Creek paramount or superior to those of the defendants in
 140 this suit, and therefore has no cause of action as against the defendants, and is not entitled to any relief in this suit."

Whereas the said Master should have found the following conclusions of law:

1. That the complainant, William A. Morris, is the lawful owner and entitled to one hundred and sixty inches of the waters of Sage Creek, and has so been the owner ever since the month of April, 1887, and was so the owner of the same at the date of the filing of his complaint herein.

2. That none of the defendants are entitled to any of the waters of Sage Creek by virtue of the statutes of limitations of ten years.

3. That the statute of Wyoming declaring the failure to use water appropriated from the streams of that State for two consecutive years works an abandonment of the right acquired by virtue of the appropriation, has no application to the claim of the complainant, William A. Morris.

4. That in order for the complainant to make a valid appropriation under the laws of Wyoming it was not necessary for him to file a statement of a water claim with the county recorder and the clerk of the District Court.

5. That the complainant, W. A. Morris, having made an appropriation of water in the State of Wyoming prior to any of the appropriations made by any of the defendants in the State of
 141 Montana, is entitled to have enough water allowed by the de-

fendants to flow down to his premises and supply his said right, and the appropriations of the defendants are all held subject, subservient and subordinate to the right of the complainant, W. A. Morris.

6. That the complainant, W. A. Morris, has not been guilty of laches in failing to bring an action sooner, and is not estopped to assert his rights against the defendants for damages and for an injunction.

7. That the complainant is entitled to an injunction against each and all of the defendants, perpetually restraining them from interfering with the flowing of the waters of Sage Creek and its tributaries to his premises in sufficient quantities to supply him with water enough to satisfy his rights.

8. That the complainant is entitled to recover of and from the defendants the sum of \$2,500.00 damages.

[Refused.—Oliver T. Crane, Master In Chancery.]

J. R. GOSS AND
 McCONNELL & McCONNELL,
Counsel for Complainant, W. A. Morris.

[Endorsed:] Title of Court and Cause. Objections to Master's Report. Filed and Entered Aug. 10, 1905. Geo. W. Sproule, Clerk. Filed Aug. 7, 1905. Oliver T. Crane, Master in Chancery.

142 And thereafter, to wit, on the 10th day of August, A. D. 1905, the exceptions of the intervener to the report of the Master were filed herein, which said exceptions are entered of final record herein as *it* follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

W. A. MORRIS, Complainant,

vs.

J. N. BEAN et al., Defendants; T. N. HOWELL, Intervener.

Exceptions of Intervener to Report of Master in Chancery.

Now comes the intervener, T. N. Howell, and excepts to so much of the report of Oliver T. Crane, standing Master in Chancery, to whom this cause was referred by an order of this court made on the 7th day of June, 1905, as follows:

I. For that the Master in his report finds:

"That the intervener, T. N. Howell, has suffered no damage to his rights inflicted by the defendants jointly."

Whereas the said Master should have found that the intervener,

T. N. Howell, has suffered damage to his rights inflicted by
143 the defendants in the sum of \$2500.00.

[Refused.—Oliver T. Crane, Master in Chancery.]

II. For that the said Master in his report finds:

"That one hundred and ten inches of water, miner's measure, is necessary for the proper irrigation of said lands of T. N. Howell."

Whereas the said Master should have found that two hundred inches of water, miner's measure, is necessary for the proper irrigation of said lands of T. N. Howell.

[Refused.—Oliver T. Crane, Master in Chancery.]

III. For that the said Master in his said report finds:

"That the value of said water right of said T. N. Howell is the sum of \$2200.00."

Whereas the said Master should have found that the value of said water right of T. N. Howell is the sum of \$3,200.00.

[Refused.—Oliver T. Crane, Master in Chancery.]

And the said intervener, T. N. Howell, excepts to so much of the conclusions of law as found by the standing Master in Chancery as follows:

I. For that the said Master in his said report of his conclusions of law finds that the intervener, T. N. Howell, is the lawful

144 owner of one hundred and ten inches of the waters of Sage Creek, whereas the said Master should have found as a conclusion of law that the intervener, T. N. Howell, is the lawful owner of two hundred inches of the waters of Sage Creek.

[Refused.—Oliver T. Crane, Master in Chancery.]

II. For that the said Master in his said report of his conclusions of law finds:

That the intervener, T. N. Howell, is not entitled to recover any

damages against the defendants or any of them in this suit; whereas the said Master should have found as a conclusion of law that the intervener, T. N. Howell, is entitled to recover against the defendants the sum of \$2,500.00.

[Refused.—Oliver T. Crane, Master in Chancery.]

J. R. GOSS AND
McCONNELL & McCONNELL,
Solicitors for the Intervener, T. N. Howell.

[Endorsed:] Title of Court and Cause. Exceptions to Master's Report. Filed and Entered Aug. 10, 1905. Geo. W. Sproule, Clerk. Filed Aug. 7th, 1905. Oliver T. Crane, Master in Chancery.

145 And thereafter, to wit, on the 10th day of August, A. D. 1905, the defendants J. N. Bean et al. filed their exceptions to the report of the Master herein, which said exceptions are entered of final record as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

In Equity—No. 666.

W. A. MORRIS, Complainant,

vs.

J. N. BEAN, JOHN SADRING, L. O. DILTZ, ALLEN P. GRAHAM, WILLIAM ELEY, CURTIS BEELER, CHARLES INGRAM, W. R. BAINBRIDGE, C. RUNYAN, WILLIAM SHOLTZ, C. E. STEELE, BERT BENT, WALLACE BENT, JOHN RHODES, F. BANDEROF, O. S. ERICKSON, TILLMAN C. GRAHAM, JAMES PAULEY, C. M. BROWN, JOHN BOWLER, J. A. KING, A. HOLM, C. H. YOUNG, CORBETT BENNETT and MICHAEL WROTE, Defendants.
T. N. HOWELL, Intervener.

146 *Exceptions of Defendants, J. N. Bean et al. to Report of Master in Chancery.*

To Oliver T. Crane, Esq., Master in Chancery, Messrs. McConnell & McConnell, Attorneys for Complainant, James R. Goss, Esq., Attorney for Intervener, and O. F. Goddard, Esq., Attorney for Defendants King, Wrote and Young:

Please take notice that the defendants J. N. Bean, W. R. Bainbridge, Bert Bent, Wallace Bent and Corbett Bennett except to the report, findings of fact and conclusions of law of the Master in Chancery in the above-entitled cause, as follows:

I.

The defendants except to that portion of the fifth finding of fact which states that complainant William A. Morris used the waters

of Sage Creek from the year 1887 to the year 1894, and moves that the year 1892 be substituted for the year 1894 in such finding.

As it appears from the testimony of Rubert Godfrey, a witness for the complainant, on page 51 of depositions on file in this cause, that Sage Creek dried up above the place of R. O. Morris in the fall of 1892.

Witness Godfrey is corroborated in this fact by defendant Corbett Bennett, as appears from his testimony on pages 159 and 560, of said depositions, and it further appears from the testimony
147 of said Bennett that the predecessors in interest of the defendants Bert Bent and Wallace Bent actually diverted the waters of Sage Creek in Montana, November 15th, 1892, pages 222 and 223 of said depositions, and that such waters have been diverted continuously by the said Bents and their predecessors in interest.

[Refused.—Oliver T. Crane, Master in Chancery.]

II.

These defendants except to the tenth finding of fact, that the intervener T. N. Howell made an appropriation out of Sage Creek in the State of Wyoming, for the reasons stated in the following exception.

[Refused.—Oliver T. Crane, Master in Chancery.]

III.

These defendants except to the eleventh finding of fact, that intervener T. N. Howell in making appropriation of the waters of Sage Creek, in the State of Wyoming, did comply with the law governing the appropriation and use of water in said State, and moves to substitute therefor that the said T. N. Howell never has complied with the requirements of the laws of the State of Wyoming, governing the appropriation of water, and the acquisition of water rights therein, for the reason that it appears from the finding of
148 fact of the Master that said T. N. Howell constructed his ditch during the month of August, 1890, but did not turn the water of the stream through said ditch until the following spring; it further appears from the notice of water right offered in evidence by the said T. N. Howell that a map showing the location or route of said ditch was never recorded in the office of the county clerk of Fremont County, the courses and distances of said ditch not appearing in said notice of water right, as required by Section 11 of the Act of March 8th, 1888, of the Laws of Wyoming.

That the said T. N. Howell never acquired a water right under said Act of 1888, that he never obtained a permit to appropriate the waters of the State of Wyoming, as required by section 34 of the Act of the Legislative Assembly of the State of Wyoming, approved December 22d, 1890.

[Refused.—Oliver T. Crane, Master in Chancery.]

IV.

These defendants except to the fourteenth finding of fact, that the said intervener raised a good crop during the year 1893, for the

reason that it clearly appears that the intervener did not have sufficient water to mature his crop in 1893, from the testimony of the witnesses Godfrey and defendant Bennett above cited, and the testimony of the said intervener, on page 41 of depositions on file in said cause, and the testimony of Charles W. English, witness for intervener, on page 67.

And these defendants further except to that portion of finding of fact numbered fourteen that intervener failed to raise any crops during the year 1894, 1895 and 1896, by reason of any act of the defendants, for the reason it appears from the record in this case that said intervener Thomas N. Howell made his petition in intervention on the 11th day of August, 1903, and complains only of the diversion made by the defendants during "the latter portion of the last past two irrigating seasons or summers." And said intervener does not complain of any acts of the defendants during the years 1894, 1895 and 1896.

[Refused.—Oliver T. Crane, Master in Chancery.]

V.

These defendants except to the fifteenth finding of fact of the Master, for the reason that the same is not supported by the allegations of the petition, as specified in the preceding exception.

[Refused.—Oliver T. Crane, Master in Chancery.]

VI.

These defendants except to the sixteenth finding of fact made by the Master, that they had due and timely notice after they commenced to use the water under their appropriations in the State of Montana, of the claim of the intervener, T. N. Howell, to the waters of Sage Creek, and that said intervener's appropriation is prior in time to any and all the appropriations made by any of the defendants, that it clearly appears from the evidence that each of these defendants and their predecessors in interest were the owners and in possession of one hundred and sixty acres of agricultural land each, as described in their answer and cross-bill, requiring irrigation at the rate of one inch per acre, and that the lands of each of the defendants are riparian to Sage Creek and its tributaries, all situated in the State of Montana, and that the defendant William E. Bainbridge is the owner of the right to appropriate three and one-fourth cubic feet per second of time of the waters of Piney Creek, a tributary of Sage Creek, as of the 25th day of August, 1900.

That the defendant J. N. Bean is the owner of the right to appropriate three and one-half cubic feet of the waters of Sage Creek, as of the 29th day of June, 1893.

That the defendant Corbett Bennett is the owner of the right to appropriate three and one-half cubic feet per second of time of the waters of Sage Creek, as of the 3d day of July, 1893.

That the defendant Wallace Bent is the owner of the right to appropriate two and one-half cubic feet per second of time of the waters of Sage Creek, as of the 28th day of October, 1892.

That the defendant S. W. Bent is the owner of the right to appropriate three and one-eighth cubic feet per second of time of the waters of Sage Creek, as of the 28th day of October, 1892.

That each of these defendants made their appropriation and diversion on the dates aforesaid, and have diverted and used the waters continuously to the extent of the flow of the stream from the time of the date of their respective appropriations as above set forth, and that said intervenor T. N. Howell has not interfered with these defendants or any of them in the use of the waters of said stream, and that all of said waters rise in the State of Montana, and these defendants move the Master in Chancery to adopt findings in accordance therewith, and in substitution of finding numbered sixteen, as such facts appear from the evidence, on pages 213 to 258, and the deposition of A. B. Huntley.

[Refused.—Oliver T. Crane, Master in Chancery.]

VII.

These defendants except to the seventeenth finding of fact and move to substitute therefor that the waters of Sage Creek sink during the irrigating season, and that a useful quantity would not reach the lands of the intervenor T. N. Howell during the
152 irrigating season, as appears from the evidence of Rubery Godfrey above cited, and the evidence of Albert H. Martin on pages 108 to 110 of depositions, and from the evidence of Frank Medhurst of pages 114 to 116, also 142, of depositions, from the evidence of F. W. Hine on pages 121 to 122 of depositions, from the testimony of J. N. Bean on pages 143 to 149 of depositions, from the testimony of Corbett Bennett on pages 159 to 163 of depositions, from the testimony of Bert Bent on pages 176 to 177 of depositions, from the testimony of Wallace Bent on pages 186 to 188 of depositions, from the testimony of William Bainbridge on pages 194 to 196 of depositions, from the testimony of Michael Wrote on pages 189 to 191 of depositions.

[Refused.—Oliver T. Crane, Master in Chancery.]

VIII.

These defendants except to the finding of fact numbered eighteen made by the Master, for the reason that no evidence whatever appears in the record, all being made by deposition and on file in court, showing the amount of damage intervenor Howell suffered during the time complained of in his petition.

[Refused.—Oliver T. Crane, Master in Chancery.]

IX.

These defendants except to the finding of fact numbered nineteen made by the Master, that one hundred and ten inches of water, miner's measure, is necessary for the proper irrigation of the land of T. N. Howell, for the reason that it appears from the findings that said T. N. Howell diverted the water claimed by him in 1891, and that he has never cultivated more than seventy acres of land, and

under the laws of the State of Wyoming, he would not be allowed to use more than forty inches of water, miner's measure.

[Refused.—Oliver T. Crane, Master in Chancery.]

X.

These defendants except to the twentieth finding of fact made by the Master for the reason that it appears from the fourteenth finding of fact that Howell did not use the waters of Sage Creek after the year 1893, and did not even attempt to raise any crops after the year 1896, while in his petition in intervention he does not complain of the diversions of these defendants at any time prior to the year of 1902, and these defendants move to substitute for said finding number twenty that the said intervener T. N. Howell has lost whatever rights he may have had in the waters of Sage Creek by abandonment.

[Refused.—Oliver T. Crane, Master in Chancery.]

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XI.

These defendants except to that portion of finding of fact number twenty-two, made by the Master, that the matters set forth in defendant's cross-bill are foreign to the subject matter of the controversy between the complainant, the intervener and the defendants.

[Refused.—Oliver T. Crane, Master in Chancery.]

XII.

These defendants move that the Master in Chancery make a further finding of fact that the said intervener T. N. Howell is a citizen of the State of Montana, as appears from his testimony on page 24 of depositions, and it does not appear anywhere in the evidence that said T. N. Howell was a citizen of the State of Wyoming at the time he filed his petition in intervention.

[Refused.—Oliver T. Crane, Master in Chancery.]

XIII.

These defendants move the Master to make an additional finding of fact that the defendants Wallace Bent and Bert Bent, and their predecessors in interest, have continuously enjoyed, diverted, appropriated and used the waters of Sage Creek uninterruptedly, without let or hindrance, and adversely to the complainant William Morris and the intervener T. N. Howell for more than ten years last
155 past, and in the amount of two and one-half cubic feet per second of time by the said Wallace Bent, and three and one-eighth cubic feet per second of time by the said Bert Bent, as appears from the testimony heretofore cited, particularly the testimony of Corbett Bennett, on pages 218 to 225, Wallace Bent, on pages 226 to 230, Bert Bent, on pages 236 to 240 of depositions, and F. W. Hine, on pages 244 and 245, and Wallace Bent, on page 247.

[Refused.—Oliver T. Crane, Master in Chancery.]

XIV.

These defendants except to the conclusion of law numbered two

found by the Master, for the reason that the said intervener T. N. Howell had never filed his declaration of water right showing the courses and distances of his ditch, and has never diverted the water of such stream or filed a plat of such ditch prior to the Act of the Legislative Assembly, approved December 22d, 1890, and that he never at any time thereafter obtained a permit to appropriate and divert the waters of Sage Creek, that for more than ten years after his first diversion of said water, he did not irrigate to exceed seven acres of land, and that one cubic foot per second of time is the maximum amount of water which *said appropriate* under the laws of the

State of Wyoming, and that intervener did not file his petition in intervention until the 5th day of September, 1903.

and does not complain of the diversion made by the defendants at any time preceding the period of two years previous to the date of the filing of such petition, and that said intervenor had failed to use any of the waters of Sage Creek for more than two years, and that the same was subject to appropriation by, and was appropriated by the defendants.

[Refused.—Oliver T. Crane, Master in Chancery.]

XV.

These defendants except to the third conclusion of law made by the Master, for the reason that the defendants Wallace Bent and Bert Bent each appropriated and diverted the waters of Sage Creek continuously and used the same adversely with their predecessors in interest, from the 15th day of November, 1892, down to the time of the filing of the said intervener's petition in intervention, to wit, the 5th day of September, 1903, and at all times thereafter.

[Refused.—Oliver T. Crane, Master in Chancery.]

XVI.

These defendants except to the fourth conclusion of law made by the Master that the Act of 1888, section 895, of the 1899 Revised Statutes of the State of Wyoming has no application to the claim of

T. N. Howell, for the reason, that the said T. N. Howell used none of the waters of Sage Creek or diverted any water therefrom from the year 1893 down to and including the present date, and for the further reason that he does not complain of the diversions of the defendants other than during the years 1892 and 1903, and the terms of said Act provide that failure of use for two consecutive years shall work a forfeiture, without reference to diversions made by other persons above the point of diversion made by the claimant.

[Refused.—Oliver T. Crane, Master in Chancery.]

XVII.

These defendants except to the fifth and sixth conclusions of law made by the Master.

[Refused.—Oliver T. Crane, Master in Chancery.]

XVIII.

These defendants except to the seventh conclusion of law made by the Master, for the reason, that it appears from the report of the findings of fact and conclusions of law made by the Master, and from the record in the cause, that the plaintiff, W. A. Morris, has no cause of action against the defendants, and that it was and is not necessary for the said Thomas N. Howell to intervene for the purpose of protecting his rights as against the plaintiff, for the reason that such plaintiff has no interest in such stream, and said intervenor expressly admits in his petition that the

158 said William A. Morris, the complainant, is entitled by priority of right over intervenor to six and one-fourth cubic feet of water per second of time of the waters of Sage Creek, being the amount claimed by the said William A. Morris, the complainant, in his bill of complaint, and that the said intervenor Thomas N. Howell is a citizen and resident of the State of Montana, and of the district of the above-entitled court, and that said court has not the custody of, neither is it attempting to administer upon, the waters of Sage Creek and is without jurisdiction to establish or decree a water right in the State of Wyoming beyond the territorial jurisdiction of the court.

U. S. Elec. Securities Co. vs. La. Elec. Light Co. (C. C.), 68 Fed. 673.

Smith vs. Lyon, 133 U. S. 315, 33 L. Ed. 635.

Hoce vs. Jamison, 166 U. S. 395, 41 L. Ed. 1049.

Clyde vs. R. D. R. Co. (C. C.), 65 Fed. 336.

Kromer vs. Everett Imp. Co., 110 Fed. 22.

And these defendants move the Master to find as a conclusion of law, as a substitute for conclusion numbered seven, that the Court has no jurisdiction of the claim and controversy between the said intervenor Thomas N. Howell and the defendants, for the reason that the Court cannot acquire jurisdiction by petition in intervention of a matter it could not acquire by the said Thomas N.

159 Howell appearing in an original proceeding, as complainant, appearing that the Court has not the custody of and cannot administer on the property in controversy, neither is it necessary for the said T. N. Howell to intervene to protect his rights and the said complainant W. A. Morris has no cause of action against the defendants.

[Refused.—Oliver T. Crane, Master in Chancery.]

XIX.

These defendants except to the eighth conclusion of law made by the Master, for the reason that said intervenor has never made any appropriation of the waters of Sage Creek, as is recognized by the laws of the State of Wyoming, and if he had, he has forfeited such right by nonuser, and the defendants Bert Bent and

Wallace Bent have superior right over the intervener by reason of adverse user, as hereinbefore pointed out and set forth, and for the further reason that at the time intervener Howell attempted to make his appropriation the headwaters of Sage Creek and the entire source of supply of such stream were then situated on an Indian Reservation in the State of Montana and not subject to appropriation; and for the further reason that said intervener has no claim and is not asserting any claim of right to the waters of Sage Creek in the State of Montana, and that he asserts his claim of appropriation in the State of Wyoming, and derives his right of use, if at all, in the State of Wyoming, and that each of these defendants makes his appropriation in the State of Montana, and while the same are owned by the citizens of such state and while they are capable of ownership by the State of Wyoming or the citizens claiming under it, or through the authority of such State.

[Refused.—Oliver T. Crane, Master in Chancery.]

All of which is respectfully submitted.

GEO. W. PIERSON,

Attorney for Wallace Bent, Bert Bent,

W. R. Bainbridge, and Corbett Bennett.

[Endorsed:] Title of Court and Cause. Exceptions to Findings of the Master. Filed and entered Aug. 10, 1905, Geo. W. Sproul, Clerk. Filed with the Master Aug. 7th, 1905. Oliver T. Crane, Master in Chancery.

And thereafter, to wit, on the 10th day of August, A. D. 1905, the defendants Wrote, King and Young filed their exceptions to the report of the Master herein, which said exceptions are entered of final record herein as follows, to wit:

161 United States Circuit Court, Ninth Circuit, District of Montana.

WILLIAM A. MORRIS, Complainant,

vs.

J. M. BEAN and Others, Defendants; T. N. HOWELL, Intervener

Objections of Defendants Wrote, King and Young to Report of Master in Chancery.

The defendants, Wrote, King and Young, hereby adopt the objections of the other defendants J. N. Bean, Corbett Bennett, William R. Bainbridge, Bert Bent and Wallace Bent, made and filed heretofore to the findings of fact and conclusions of law made by the Master in this cause, and ask his Honor, the Master, to consider said objections as if the same had been expressly made by the said defendants Wrote, King and Young; and in addition thereto, they ask the Master to find the facts as to their several appropriations

162 water as of the dates and amounts as stated in their request for findings heretofore filed herein as well as the findings of conclusions of law as requested by them heretofore.

Dated this 5th day of August, A. D. 1905.

O. F. GODDARD,

Attorney for Defendants Michael Wrote,

J. A. King, and C. H. Young.

[Refused.—Oliver T. Crane, Master in Chancery.]

[Endorsed:] Title of Court and Cause. Objections to Findings of Master. Filed and Entered Aug. 10, 1905, Geo. W. Sproule, Clerk. Filed August 7th, 1905. Oliver T. Crane, Master in Chancery.

And thereafter, to wit, on the 28th day of May, A. D. 1906, amended findings were duly filed herein, which said amended findings are entered of final record herein as follows, to wit:

163 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

W. A. MORRIS, Complainant.

vs.

J. N. BEAN, JOHN SADRING, L. O. DILTS, ALLEN P. GRAHAM, William Eley, Curtis Beeler, Charles Ingram, W. R. Bainbridge, C. Runyan, William Sholtz, C. E. Steele, Bert Bent, Wallace Bent, John Rhodes, F. Banderof, O. S. Erickson, Tillman C. Graham, James Pauley, C. M. Brown, John Bowler, J. A. King, A. Holm, C. H. Young, Corbett Bennett, and Michael Wrote, Defendants; T. N. Howell, Intervener.

Amended Findings of Fact and Conclusions of Law, Adopted by Circuit Court.

Be it remembered that this cause came on to be heard before the Hon. Edward Whitson, Judge presiding by interchange with the Hon. William H. Hunt, on the 12th day of September, 1905, upon the report of the Master in Chancery, making findings of
164 fact and conclusions of law, filed in said cause on the 10th day of August, 1905, and upon exceptions to said report, when, after argument by counsel representing the plaintiff and intervener and by counsel representing the defendants, J. N. Bean, W. R. Bainbridge, Bert Bent, Wallace Bent, Corbett Bennett, and the defendants Wrote, King and Young to the report of the Master in Chancery, the Court took the same under advisement and handed down his decision and written opinion on the 6th day of May, 1906, sustaining a portion of the exceptions to the said Master's report and overruling the others as follows, to wit: The Court sustained the exceptions to the findings of fact as to the right of the

Wallace Bent have superior right over the intervener by reason of adverse user, as hereinbefore pointed out and set forth, and for the further reason that at the time intervener Howell attempted to make his appropriation the headwaters of Sage Creek and the entire source of supply of such stream were then situated on an Indian Reservation in the State of Montana and not subject to appropriation; and for the further reason that said intervener has no claim and is not asserting any claim of right to the waters of Sage Creek in the State of Montana, and that he asserts his claim of appropriation in the State of Wyoming, and derives his right of use, if at all, in the State of Wyoming, and that each of these defendants makes his appropriation in the State of Montana, and while the same are owned by the citizens of such state and while they are capable of ownership by the State of Wyoming or the citizens claiming under it, or through the authority of such State.

[Refused.—Oliver T. Crane, Master in Chancery.]

All of which is respectfully submitted.

GEO. W. PIERSON.

Attorney for Wallace Bent, Bert Bent,

W. R. Bainbridge, and Corbett Bennett.

[Endorsed:] Title of Court and Cause. Exceptions to Findings of the Master. Filed and entered Aug. 10, 1905, Geo. W. Sproule, Clerk. Filed with the Master Aug. 7th, 1905. Oliver T. Crane, Master in Chancery.

And thereafter, to wit, on the 10th day of August, A. D. 1905, the defendants Wrote, King and Young filed their exceptions to the report of the Master herein, which said exceptions are entered of final record herein as follows, to wit:

161 United States Circuit Court, Ninth Circuit, District of Montana.

WILLIAM A. MORRIS, Complainant.

vs.

J. M. BEAN and Others, Defendants; T. N. HOWELL, Intervener.

Objections of Defendants Wrote, King and Young to Report of Master in Chancery.

The defendants, Wrote, King and Young, hereby adopt the objections of the other defendants J. N. Bean, Corbett Bennett, William R. Bainbridge, Bert Bent and Wallace Bent, made and filed herein to the findings of fact and conclusions of law made by the Master in this cause, and ask his Honor, the Master, to consider said objections as if the same had been expressly made by the said defendants Wrote, King and Young; and in addition thereto, they ask the Master to find the facts as to their several appropriations of

162 water as of the dates and amounts as stated in their request for findings heretofore filed herein as well as the findings of conclusions of law as requested by them heretofore.

Dated this 5th day of August, A. D. 1905.

O. F. GODDARD,

Attorney for Defendants Michael Wrote,

J. A. King, and C. H. Young.

[Refused.—Oliver T. Crane, Master in Chancery.]

[Endorsed:] Title of Court and Cause. Objections to Findings of Master. Filed and Entered Aug. 10, 1905, Geo. W. Sproule, Clerk. Filed August 7th, 1905, Oliver T. Crane, Master in Chancery.

And thereafter, to wit, on the 28th day of May, A. D. 1906, amended findings were duly filed herein, which said amended findings are entered of final record herein as follows, to wit:

163 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

W. A. MORRIS, Complainant,

vs.

J. N. BEAN, JOHN SADRING, L. O. DILTS, ALLEN P. GRAHAM, William Eley, Curtis Beeler, Charles Ingram, W. R. Bainbridge, C. Runyan, William Sholtz, C. E. Steele, Bert Bent, Wallace Bent, John Rhodes, F. Banderof, O. S. Erickson, Tillman C. Graham, James Pauley, C. M. Brown, John Bowler, J. A. King, A. Holm, C. H. Young, Corbett Bennett, and Michael Wrote, Defendants; T. N. Howell, Intervener.

Amended Findings of Fact and Conclusions of Law, Adopted by Circuit Court.

Be it remembered that this cause came on to be heard before the Hon. Edward Whitson, Judge presiding by interchange with the Hon. William H. Hunt, on the 12th day of September, 1905, upon the report of the Master in Chancery, making findings of
164 fact and conclusions of law, filed in said cause on the 10th day of August, 1905, and upon exceptions to said report, when, after argument by counsel representing the plaintiff and intervener and by counsel representing the defendants, J. N. Bean, W. R. Bainbridge, Bert Bent, Wallace Bent, Corbett Bennett, and the defendants Wrote, King and Young to the report of the Master in Chancery, the Court took the same under advisement and handed down his decision and written opinion on the 6th day of May, 1906, sustaining a portion of the exceptions to the said Master's report and overruling the others as follows, to wit: The Court sustained the exceptions to the findings of fact as to the right of the

complainant, W. A. Morris, Nos. 1, 2, 3 and 4, and also sustained exception No. 1 to the conclusions of law.

The Court overruled the exceptions of the defendants, J. N. Bean, W. R. Bainbridge, Bert Bent, Wallace Bent, Corbett Bennett, and the defendants, Wrote, King and Young No. 1 to the report of the Master as to the right of the complainant, W. A. Morris, and ordered that said findings of fact and conclusions of law as to the right of W. A. Morris be amended according to the said rulings, and as so amended the Court adopted the findings of fact and conclusions of law of the Master in Chancery as to the right of the complainant, W. A. Morris.

In the matter of the right of T. N. Howell, the Court overruled the exceptions to the findings of fact of the intervener T. N. Howell Nos. 1 and 2 and sustained the exception to finding of fact No. 3.

The Court overruled exceptions 1 and 2 to the conclusions of law as found by the Master.

The Court overruled the exceptions of the defendants mentioned above to the report of the Master touching the right of the intervener T. N. Howell.

The Court also overruled the exceptions of the defendants above mentioned to the conclusions of law made by the Master in relation to the rights of the intervener T. N. Howell.

The Court overruled all the other exceptions on the part of the defendants to said findings of fact and conclusions of law of the Master in Chancery.

The Court ordered that judgment be entered in favor of the complainant W. A. Morris for 100 miner's inches of water appropriated from Sage Creek, and also judgment in favor of the intervener T. N. Howell for 110 inches of water, miner's measure, appropriated from said creek.

The Court found that by reason of the fact that the proof does not segregate the damage committed by the trespass of each of the defendants, there being no proof showing a joint or concerted trespass, the defendants can recover only nominal damages.

The findings of fact and conclusions of law of the Master in Chancery, as amended by the Court, are as follows, to wit:

166 *Findings of Fact of Master in Chancery—Amended.*

1. That Sage Creek is a natural watercourse, having its source in the Pryor Mountains, Carbon Count-, State of Montana, flowing in a general southerly direction, in its natural channel, through a portion of said Carbon County, State of Montana, to the dividing line between the States of Wyoming and Montana, and from thence on into the said State of Wyoming, and emptying into the Stinking Water River.

2. That the complainant, William A. Morris, was, at the time of the commencement of this suit, and is now, a citizen of the United States, and a citizen and resident of the State of Wyoming.

3. That the complainant, William A. Morris, is the owner of,

and in possession of, and was at the time of the commencement of this suit, in the possession of the land situate in the State of Wyoming, and described in paragraph 4 of the bill of complaint, to wit:

All of the southwest quarter (S. W. $\frac{1}{4}$) of the southeast quarter (S. E. $\frac{1}{4}$), and the east half (E. $\frac{1}{2}$) of the southwest quarter (S. W. $\frac{1}{4}$) of section thirty (30), and the northeast quarter (N. E. $\frac{1}{4}$) of the northwest quarter (N. W. $\frac{1}{4}$), of section thirty-one (31), in township fifty-eight (58), north of range ninety-seven (97) west, containing one hundred sixty (160) acres of lands, according to the Government Survey thereof, situate in the counties of Fremont and Big Horn in the Territory and State of Wyoming.

4. That the said Sage Creek flows in its natural channel through the said lands of the said complainant, William A. Morris.

5. That the said lands of the complainant, William A. Morris, were taken up by the said Morris as a homestead in the year 1887 and were and are agricultural lands, and are arid, requiring irrigation to make them produce good crops; that the complainant, William Morris, for the purpose of irrigating said lands, made an appropriation on the — day of April, 1887, out of Sage Creek, in the State of Wyoming by placing a dam in said creek and constructing a ditch two feet wide on the bottom, three feet wide on top and twenty inches deep, with a uniform grade of eighteen to twenty feet to the mile and thereby diverted the water from Sage Creek through said ditch and carrying the same to, on and upon his said lands; that the said ditch is capable of carrying 14.6 cubic feet per second, equal to 584 miner's inches of water; that by virtue of his said appropriation the said complainant William A. Morris, had plenty of water each year from 1887 up to 1894; that his first shortage was in 1894, and after that he had water enough from his said appropriation to raise a full crop of alfalfa for the first crop and half a crop for the second crop, but by reason of the shortage of water he could not raise a third crop, as he had been accustomed to before the year 1894.

6. That the value of the water right of the complainant, William A. Morris is the sum of \$3,200.00.

7. That the complainant, William A. Morris, cultivated the first year, after he had so appropriated his water, eight acres of oats, six acres of corn and two or three acres of garden, and irrigated for hay about twenty or twenty-five acres, and in succeeding years kept increasing the area in cultivation for four or five years, when he had in about one hundred acres of alfalfa and grain; that he irrigated the whole one hundred and sixty acres for pasture and hay and grain; said land being good, productive, level land.

8. That the shortage of water from 1894 to the time suit was commenced was owing to the use of water by the defendants, thereby depriving said complainant of said water.

9. That the defendants had due and timely notice after they commenced the use of the water under their appropriation in the State of Montana of the claim of the complainant, William A. Morris, to

the waters of Sage Creek, and that the complainant's appropriation was prior in time to any and all of the appropriations made by the defendants.

10. That said William A. Morris used water upon his said
169 land from Sage Creek each and every year from the time of
his appropriation in April, 1887, up to the time of the com-
mencement of this suit.

11. That the water does not sink by reason of quicksands during the irrigating season between the mouth of Piney Creek and the lands of the complainant William A. Morris, but that the same would reach complainant's land if allowed to flow down to him by the defendants.

12. That the complainant has been damaged by reason of the loss of water on account of the use of the same by the defendants in the sum of \$2500.00.

13. That 100 inches of water, miner's measure, is necessary for the proper irrigation of the lands of said complainant.

14. That the complainant William A. Morris never voluntarily abandoned or ceased to use the waters of Sage Creek for any two consecutive years since the date of his appropriation in 1887, but was compelled to cease the use of said water for several years before the filing of the complaint in this action by reason of the fact that the defendants deprived him of the water.

Conclusions of Law of Master in Chancery—Amended.

1. That the complainant, William A. Morris, is the lawful owner and entitled to 100 inches, miner's measure, of the waters of Sage
Creek, and has so been the owner ever since the month of
170 April, 1887, and was so the owner at the date of the filing of
his complaint herein.

2. That none of the defendants are entitled to any of the waters of Sage Creek by virtue of the statute of limitations of ten years.

3. That the statute of Wyoming declaring the failure to use water appropriated from the streams of that State for two consecutive years works an abandonment of the right acquired by virtue of the appropriation has no application to the claim of the complainant, William A. Morris.

4. That in order for the complainant to make a valid appropriation under the laws of Wyoming it was not necessary for him to file a water claim with the county recorder and the clerk of the District Court.

5. That the complainant, W. A. Morris, having made an appropriation of water in the State of Wyoming prior to any of the appropriations made by any of the defendants in the State of Montana, is entitled to have enough water allowed by the defendants to flow down to his premises to supply his said right, and the appropriations of the defendants are all held subject, subservient and subordinate to the right of the complainant, W. A. Morris.

6. That the complainant, W. A. Morris, has not been guilty of

laches in failing to bring an action sooner, and is not estopped to assert his rights against the defendants for damages and for an injunction.

7. That the complainant is entitled to an injunction against each and all of the defendants perpetually restraining them from interfering with the flowing of the waters of Sage Creek and its tributaries to his premises in sufficient quantity to supply him with enough water to satisfy his rights.

That the complainant is entitled to recover from the defendants the sum of \$1.00 (one), the same being nominal damages.

9. That under the laws of the State of Wyoming there does not exist in that State, as incident to the ownership of riparian soil, any common law riparian rights.

1. That the intervener, T. N. Howell, is the owner of and in possession of, and was in possession of at the time of the commencement of this action, the lands described in paragraph IV of his complaint in intervention, to wit: The west half of the northwest quarter and the southeast quarter of the northeast quarter and the north half of the southeast quarter of section 29, township 57 north, range 97 west, containing 200 acres; that he went into possession of said lands in the summer of 1890, and has been in possession of the same ever since up to the present time; that he has a receiver's receipt for a patent for these lands.

2. That said lands of T. N. Howell are agricultural lands and are arid, requiring irrigation to make them produce crops.

3. That the intervener, T. N. Howell, made an appropriation out of Sage Creek in the State of Wyoming by placing a dam in said creek and constructing a ditch therefrom five feet on the bottom, six feet on top, 16 inches deep, having a uniform grade of one-quarter of an inch to the rod. The point of diversion in said creek is one and one-half miles from the place of use by means of said dam and ditch diverting water from said stream and carrying the same on and upon his said lands; that said ditch has a capacity of 13 7/10 cubic feet per second, or 548 miner's inches.

4. That the intervener, T. N. Howell, in making said appropriation of water from Sage Creek, in the State of Wyoming, did comply with the provisions of the laws of Wyoming governing the appropriation and use of water in said State.

5. That the value of said water right of said T. N. Howell is the sum of \$3,200.00.

6. That the said T. N. Howell commenced the construction of his dam and ditch on the first day of August, 1890; that he turned in the water in the following spring and conducted the same through said ditch to and upon his said ranch and used the same for irrigating crops thereon.

7. That said T. N. Howell has had part of his land in grain, alfalfa and timothy. The first year he cultivated and sowed forty acres of alfalfa; that he increased this from year to year, sowing as high as seventy acres of alfalfa at one time, besides cultivating upon the same crops of grain—being oats and wheat; that he has

been in possession of said land ever since the summer of 1890 up to the present time; that he cultivated his land in 1891, 1892, and 1893, raising goods crops; that in 1894, 1895 and 1896 he sowed crops but failed to raise any by reason of the fact that the defendants deprived him of water so that his crops dried up and perished.

8. That he never abandoned his said ranch nor the use of water thereon voluntarily from the time he first made his appropriation up to the commencement of this law suit, but that he was forced to discontinue the use of water after 1894 by reason of the fact that he could not get the water—the same having been appropriated and used by the defendants in the State of Montana.

9. That the defendants had due and timely notice after they commenced the use of the water under their appropriations in the State of Montana of the claim of the intervener, T. N. Howell, to the waters of Sage Creek as hereinafter set forth in these findings; that the intervener's appropriation, as set forth in these findings, is prior in time to any and all of the appropriations made
174 by any of the defendants; that the same was made at a time when all of the territory tributary to the waters of Sage Creek and its tributaries was a part of the Crow Reservation.

10. That the water does not sink by reason of quicksands during the irrigating season between the mouth of Piney Creek and the lands described in these findings of the said T. N. Howell, but that the same would reach intervener's land if allowed to flow down to him by the defendants.

11. That the complainant has been damaged by reason of the loss of water in the sum of \$2,500.00.

12. That 110 inches of water, miner's measure, is necessary for the proper irrigation of the lands of T. N. Howell.

13. That the intervener, T. N. Howell, did not abandon or cease to use the waters of Sage Creek for any two consecutive years since the date of his appropriation voluntarily, but was compelled to cease the use of said water for several years before the filing of his complaint in intervention by reason of the fact that the defendants deprived him of water.

14. That the intervener, T. N. Howell, has suffered no damage to his rights inflicted by the defendants jointly.

That all the defendants herein are citizens of the State of Montana, and the matters set forth in their cross-bill are foreign to the subject matter in controversy between the complainant and the intervener and the defendants.

175 *Conclusions of Law of Master in Chancery—Amended.*

1. That the intervener, T. N. Howell, made a valid appropriation under the laws of Wyoming and is the lawful owner of 110 inches of the waters of Sage Creek, and has been ever since the first day of August, 1890, and was so the lawful owner of the same on the 5th day of September, 1903, at the date of the filing of his complaint in intervention.

2. That none of the defendants are entitled against the intervener,

T. N. Howell, to any of the waters of Sage Creek by virtue of the statute of limitations of ten years.

3. That the statutes of Wyoming declaring the failure to use water appropriated from streams of that State for two consecutive years works an abandonment of the right acquired by virtue of such appropriation has no application to the claim of T. N. Howell under the facts found in this case.

4. That under the laws of the State of Wyoming there is no such thing as riparian rights, and it is not necessary for said intervenor to allege and prove that he made his appropriation on the public domain or acquired the right from the prior riparian owner.

5. T. N. Howell having commenced his dam and ditch in the month of August, 1890, and turned the water in through the same and used it upon his premises in the spring of 1891, made an appropriation of date the first day of August, 1890, and he was not required to comply with the law on December 22, 1890, in order to acquire a valid water right.

6. The jurisdiction of the United States Circuit Court does not depend upon the citizenship of the intervenor, T. N. Howell, but upon the citizenship of the complainant, W. A. Morris.

7. The intervenor, T. N. Howell, having made an appropriation in the State of Wyoming prior to any of the appropriations made by the defendants in the State of Montana, is entitled to have enough water allowed by the defendants to flow down to his premises to supply his said right, and the appropriations of the defendants are all held subject to and subordinate to the intervenor, T. N. Howell.

8. That the intervenor, T. N. Howell, is not entitled to recover any except nominal damages against the defendants, or any of them in this suit.

9. That under the pleadings and facts in this suit this Court has no jurisdiction to determine the defendants' controversy inter sese as to their priorities or rights in and to the waters of Sage Creek.

The Court adopts the foregoing amended findings of fact and conclusions of law.

Dated, signed and passed in open court this the 28th day of May, A. D. 1906.

EDWARD WHITSON, *Judge*.

177 [Endorsed:] Title of Court and Cause. Amended Findings. Filed and Entered May 28, 1906. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 28th day of May, A. D. 1906, a final decree was duly made and entered herein, which said final decree is entered of final record herein as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

W. A. MORRIS, Complainant,

vs.

J. N. BEAN, JOHN SADRING, L. O. DILTS, ALLEN P. GRAHAM, William Eley, Curtis Beeler, Charles Ingram, W. R. Bainbridge, C. Runyan, William Sholtz, C. E. Steele, Bert Bent, Wallace Bent, John Rhodes, F. Banderof, O. S. Erickson, Tillman C. Graham, James Pauley, C. M. Brown, John Bowler, J. A. King, A. Holm, C. H. Young, Corbett Bennett, and Michael Wrote, Defendants; T. N. Howell, Intervener.

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Final Decree.

This cause came on further to be heard at this term, before the Honorable Edward Whitson, sitting by interchange with the Honorable William H. Hunt, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, to wit:

That the complainant W. A. Morris is entitled to one hundred inches, miner's measurement, of the waters of Sage Creek, and its tributaries, of date April, 1887.

It is further ordered, adjudged and decreed that the intervener, T. N. Howell, is entitled to one hundred and ten inches of the waters of Sage Creek and its tributaries, miner's measurement, of date August the 1st, 1890.

That as between the complainant and intervener, the complainant being prior in time, is prior in right.

It is further ordered, adjudged and decreed that the complainant and intervener each being prior in time to any and all of the defendants, is prior in right to them.

It is further ordered, adjudged and decreed that the defendants and each and every of them, their solicitors, attorneys, servants, agents, representatives and their successors in interest be and they are hereby perpetually enjoined from in any manner interfering with the rights of the complainant and intervener as determined in this decree, and they are all commanded to allow at all times, when needed by the complainant and intervener, a sufficient amount of water to flow down to them to satisfy their rights.

It is further ordered, adjudged and decreed that the amount of water hereby decreed to the complainant, W. A. Morris, and the intervener, T. N. Howell, shall be measured and determined at the point where the water is diverted from said Sage Creek, and the said parties shall construct a substantial headgate at such point, which shall be of such construction that it can be locked and kept closed by the water commissioner; and said parties shall also construct a flume or measuring device as near the head of said ditch as is practical for the purpose of measuring and determining the

amount of water that may be diverted into said ditch from the said stream.

It is further ordered, adjudged and decreed that the complainant and his successors in interest be and they are hereby perpetually enjoined from in any manner depriving the intervener from the use of the water herein decreed to him, by refusing to allow any surplus to flow down to said intervener, which may be in the creek over and above enough to supply the rights of the complainant as herein decreed when said intervener needs said water.

It is further ordered, adjudged and decreed that \$500.00 of the costs be apportioned equally between the defendants, J. N. Bean, W. R. Bainbridge, Bert Bent, Wallace Bent, J. A. King, C. H. Young, Corbett Bennett and Michael Wrote.

It is further ordered, adjudged and decreed that the defendants C. E. Steele, John Rhodes and A. Holm, pay no costs, as they filed their answer disclaiming any interest in the water in controversy.

It is further ordered, adjudged and decreed that the other defendants not herein above named pay the sum of \$75.80, the costs of the marshal for serving upon them the complaint and and intervention, and subpoena to answer.

Execution will issue accordingly.

Dated, signed and passed in open court this 28th day of May, 1906.

EDWARD WHITSON, *Judge.*

[Endorsed:] Title of Court and Cause. Final Decree. Filed and Entered May 28th, 1906. Geo. W. Sproule, Clerk.

Final Record.

Whereupon, said pleadings, process and final decree are entered of final record herein in accordance with the law and the practice of this Court.

Witness my hand and the seal of said Court at Helena, Montana, this 28th day of May, A. D. 1906.

[SEAL.]

GEO. W. SPROULE, *Clerk.*

By C. R. GARLOW,

Deputy Clerk.

181 [Endorsed:] Title of Court and Cause. Final Record. Filed and Entered May 28th, 1906. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

And thereafter, to wit, on the 30th day of January, A. D. 1905, stipulation and deposition of A. L. Huntley were filed herein, as follows, to wit:

In the United States Court, Ninth Circuit, District of Montana.

WILLIAM A. MORRIS,

vs.

J. N. BEAN et al.

Stipulation Relative to Taking of Deposition of A. L. Huntley.

Whereas, one A. L. Huntley is a material witness for and on behalf of the defendants, Wallace Bent and Bert Bent, in the above-entitled cause, and the said Huntley is without the jurisdiction of the Court, and resides at Cowlee, Northwest Territory, Dominion of Canada, and the above-named defendants, being desirous of taking the testimony of the said witness, now, therefore, it is hereby mutually stipulated and agreed by and between the respective counsel in said cause, Messrs. McConnell and McConnell, for the said petitioner William A. Morris, and for intervener Thomas N. Howell, and O. F. Goddard for defendants J. A. King, Allen P. Graham, Michael

182 Wrote, William Ealy and C. H. Young and Geo. W. Pierson for defendants J. N. Bean, W. R. Bainbridge, Bert Bent,

Wallace Bent and Corbett Bennett, that the said A. L. Huntley may appear before Arthur Burnett, a notary public of Maple Creek, Northwest Territory, Dominion of Canada, and give his testimony touching the matters in issue in the above-entitled cause, which testimony shall be reduced to writing as answers to the annexed written interrogatories, and thereafter the same shall be certified to by the said Arthur Burnett, and mailed to the clerk of the above-entitled Court, at Helena, Montana.

That said questions and answers may be introduced in evidence, by the any party to said action, as the testimony of the said A. L. Huntley, subject to all objections, except as to form of interrogatories, as if the said witness were present in person and testifying in open court.

Dated September 12th, 1904.

J. R. GOSS,

McCONNELL & McCONNELL,

Attorneys for William A. Morris and Thomas N. Howell.

O. F. GODDARD,

Attorney for J. A. King, Allen P. Graham,

Michael Wrote, William Ealy and C. Young.

GEO. W. PIERSON,

Attorney for J. N. Bean, W. R. Bainbridge,

Wallace Bent, Bert Bent and Corbett Bennett.

183 In the United States Circuit Court, Ninth Circuit, State of Montana.

HILLIAM MORRIS

VS.

J. N. BEAN et al.

Deposition of A. L. Huntley.

Interrogatory No. 1. State your name, age and place of residence.

Ans. Abraham L. Huntley is my name. I am 40 years of age and reside at Battle Creek, in the northwest territories.

Int. No. 2. Did you ever reside at Sage Creek, in the county of Carbon, State of Montana, and if so, state when and for what length of time, and where you resided prior to moving to Sage Creek.

Ans. Yes, I resided for about three years on Sage Creek in the County of Carbon, State of Montana, and went there to live on or about the 20th of September, 1892. Previous to this date, I lived at Park City, in the State of Montana.

Int. No. 3. State whether or not you are acquainted with the lands embraced in the respective homestead entries of Bert Bent and Wallace Bent, situated on Sage Creek, and if you are, state if you know, who were the first persons to take possession of them, when a part of the public domain.

184 Ans. I am acquainted with the lands embraced in the respective homestead entries of Bert Bent and Wallace Bent situated on Sage Creek. John Widman and myself first took possession of these lands, when same were a part of the public domain.

Int. No. 4. State whether or not any waters of Sage Creek were appropriated to irrigate said lands, and if so state who made the appropriation for each place.

Ans. The waters of Sage Creek were appropriated to irrigate said lands. I made the appropriation for the Bert Bent homestead entry and John Widman made the appropriation for the Wallace Bent homestead entry.

Int. No. 5. If water was appropriated by means of a ditch, describe the location of the headgate of such ditch on the stream, stating which bank the ditch tapped the stream, give width of ditch on top and on the bottom, depth of same and the grade.

Ans. The headgate of the irrigation ditch in question was located about 300 yards from the Bridger Road Crossing, in a northeasterly direction therefrom on the east bank of Sage Creek. The irrigation ditch in question was 36 inches wide on the bottom and 72 inches wide on top. The ditch in question had a fall of about one inch for every rod, so far as I remember.

185 Int. No. 6. State when you last saw the ditch, and whether or not it has been enlarged since the time of its construction.

Ans. I last saw the ditch in question about two years and seven

months previous to the present date. At that time it had not been enlarged, so far as I could see.

Int. No. 7. State what experience, if any, you have had in measuring water, or to what extent you have observed measured water.

Ans. I have had some experience in measuring water, and I have observed measured water to the extent that I know that the ditch in question would carry about 500 inches.

Int. No. 8. If you are acquainted with the measurement of water in Montana, state the carrying capacity of the aforesaid ditch when completed, and its carrying capacity when water was first conducted through the same.

Ans. The carrying capacity of this ditch was 500 inches of water and such was the capacity when water was first conducted through the same.

Int. No. 9. State when construction work was begun on the ditch and how the work progressed, and when water was first turned through the same, and the ditch completed.

Ans. Construction work was begun on this ditch at a date slightly before the 28th of October, 1892. I finished the construction work in the fall of the same year, and the water was turned on, so far as I remember, about the middle of November, of the same year.

Int. 10. State when water first reached the Bert Bent Place, and when it reached the Wallace Bent Place.

Ans. So far as I can remember, the water first reached the places about the middle of November, 1892.

Int. 11. State whether or not you are the Abraham L. Huntley named in a notice of appropriation of 500 inches of the water of Sage Creek, and filed in the office of the Yellowstone County Clerk and Recorder on the first day of November, 1892?

Ans. I am that Abraham L. Huntley.

Int. 12. If you answer the above interrogatory in the affirmative, state whether or not you ever posted a notice of your appropriation at the intended headgate of your ditch, and if so, give the date of posting such notice, and the contents of the same, and by whom it was signed, and describe the place on such stream at which you posted the same?

Ans. I posted a notice of appropriation of water at the intended headgate of the ditch in question on the 30th of October, 1892, on the west bank of Sage Creek. This notice stated that I and John Widman had appropriated 500 inches of the water of Sage Creek for our use and benefit on our respective lands. This notice was signed by Widman and myself.

187 Int. 13. State by whom if anyone, your notice of appropriation was signed, or whose names were attached thereto, and where you obtained such notice, and the circumstances making the same?

Ans. Our notice of appropriation was signed by Widman and myself. I obtained the notice in Billings, Montana, at the office of the Clerk and Recorder. So far as I remember we obtained and posted the notice so that the public might know of our appropriation.

Int. 13. State how the contents of the posted notice compares with the recorded notice?

Ans. So far as I know the posted notice was a duplicate of the recorded notice.

Int. 14. State to what extent the waters of Sage Creek were kept running through the above mentioned ditch, as to whether the same were flowing continuously during the irrigating season, uninterruptedly, without hindrance, and give quantity of water continuously flowing through said ditch, and what use if any was made of such waters, each year?

Ans. The waters of Sage Creek flowed through the ditch in question continuously during the irrigation season. At times the whole appropriation was flowing through the ditch, at other times about one-half of the appropriation, and again at other times hardly
188 any. We used the water in question for stock purposes and land irrigating purposes and for household use.

Int. 15. State who now possesses the lands described in your notice of appropriation, and who occupied same at the time the appropriation of water was made.

Ans. Bert Bent and Wallace Bent now occupy the lands described in the notice of appropriation, that applied at the time in question to myself and John Widman.

Int. 16. State if you know, what disposition was made of the land occupied by John Widman, and the waters appropriated for the same?

Ans. Wallace Bent now owns the land occupied at the time in question by John Widman, and the irrigation ditch in question, so far as I know, is still in use for said lands.

Int. 17. State what disposition was made of the lands occupied by yourself, and the waters appropriated for the same.

Ans. The lands occupied by myself at the time in question, are now occupied by Bert Bent, and so far as I know he still uses on the same the irrigation ditch herein mentioned.

I, Arthur Burnett, a notary public in and for the Northwest Territories, residing and practicing at Maple Creek, in said Territories, do hereby certify that A. L. Huntley of Coulie, in the
189 Northwest Territories, appeared before me, said notary, on the sixteenth day of November, 1904, and beginning at interrogatory number 1 answered consecutively the seventeen attached direct interrogatories, and that I, said notary, wrote consecutively after each interrogatory the answer or answers of the said A. L. Huntley thereto precisely as he gave and dictated the same to me, and that all of such answers are in my proper handwriting.

That before taking the answers of the said A. L. Huntley, to the attached interrogatories, I administered to him the usual oath to be taken by witnesses in giving testimony in a Canadian court of law.

Dated at Maple Creek this 16th day of November, A. D. 1905.

[SEAL.]

ARTHUR BURNETT,

A Notary Public in and for the Northwest Territories.

[Endorsed:] Title of Court and Cause. Deposition of A. L. Huntley. Filed and Entered Jan. 30, 1905. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 29th day of March, A. D. 1905, stipulation and depositions of J. F. Lapman et al. were filed herein, as follows, to wit:

190 In the Circuit Court of the United States, Ninth Circuit,
District of Montana.

WILLIAM A. MORRIS, Plaintiff,

vs.

J. N. BEAN, JOHN SADRING et al., Defendants; THOMAS N. HOWELL,
Intervener.

Stipulation Relative to Taking of Certain Depositions.

It is hereby stipulated by and between counsel for the parties hereto as follows, to wit: That counsel for the plaintiff and the intervenor may take the depositions of the following persons upon interrogatories, to wit: James F. Lampman, Charles A. Sarver, James F. Howell, Owen G. Norton and Joseph H. Neville at the office of said Joseph H. Neville at Garland, Wyoming, before C. B. King, a notary public; or if said C. B. King is not available, then before some other notary public at said time and place, subject to same objections as if witness were testifying in court. The interrogatories to be propounded to said witnesses are hereto attached. It is further stipu-

191 lated that any of the defendants may take additional testimony by interrogatories, duly served, at such time and place as they may see fit to do so.

This February 15, 1905.

J. R. GOSS,

McCONNELL & McCONNELL,

Attorneys for the Plaintiff and Intervener.

O. F. GODDARD,

Attorney for J. A. King, C. H. Young,

Michael Wrote, Wm. Eley.

GEO. W. PIERSON,

Attorneys for J. N. Bean, Corbett Bennett,

Wm. Bainbridge, Wallace Bent, and Bert Bent.

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

WILLIAM A. MORRIS, Plaintiff,

vs.

J. N. BEAN, JOHN SADRING et al., Defendants; THOMAS N. HOWELL, Intervener.

Interrogatories to be Propounded to Witnesses James F. Lampman et al.

Depositions of James F. Lampman, Charles A. Sarver, James F. Howell, Owen G. Norton, and Joseph H. Neville, produced, sworn and examined on the 27 day of March, 1905, under and by virtue of the stipulation hereto attached, in a certain water case depending in the Circuit Court of the United States, Ninth Circuit, District of Montana, and at issue between W. A. Morris, plaintiff, and T. N. Howell, intervener, and J. N. Bean et al., defendants:

Interrogatories to be Propounded to the Witness James F. Lampman.

Said witness, JAMES F. LAMPMAN, being duly sworn, testified as follows:

Interrogatory I. State your name, age and place of residence.

Int. II. Are you acquainted with the ranches of the plaintiff, W. A. Morris, and the intervener, T. N. Howell, situated in Bighorn County, State of Wyoming; if so, state how long you have been acquainted with said ranches.

Int. III. State whether you are acquainted with Sage Creek, which runs out of the State of Montana into the State of Wyoming and to or near to the said ranches of W. A. Morris and T. N. Howell.

Int. IV. How long have you been acquainted with said Sage Creek?

Int. V. State whether you are acquainted with the irrigating ditches of said W. A. Morris and said T. N. Howell, used by them upon their said respective ranches.

193 Int. VI. State particularly what acquaintance you have with said Sage Creek from the point of confluence of Pine Creek with Sage Creek to the point where said Sage Creek empties into the river.

Int. VII. State what is the formation or character of the bottom of said Sage Creek between the points above indicated.

Int. VIII. State what you may know in regard to whether the bed of said creek between said points named is composed of gravel bars and quicksands so that the water sinks away and does not run as far as the ranches of W. A. Morris and T. N. Howell during the irrigating season, or whether the water, if allowed to come down without being diverted from said stream, will flow to the ranches of said W. A. Morris and T. N. Howell in quantities sufficient to irri-

gate said ranches during the irrigating season. Give all the facts fully.

Int. IX. State what you may know as to the water reaching, during the irrigating season, the said ranches of said W. A. Morris and T. N. Howell before said waters were appropriated by the defendants in the State of Montana.

Int. X. If in answer to the foregoing interrogatory you say that the water came down in sufficient quantities to irrigate the ranches of said W. A. Morris and T. N. Howell, give the years that to your knowledge the waters did so come down.

194 Int. XI. State whether you have had any experience in irrigating lands, and if so, state to what extent.

Int. XII. State the value of the water right of said W. A. Morris and T. N. Howell respectively.

Int. XIII. Do you know or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this cause, or either or any of them, or that may be material to this your examination, or the matters in question in this cause? If yes, set forth the same fully and at large in your answer.

Interrogatories to be Propounded to the Witness Charles A. Sarver.

Said witness CHARLES A. SARVER being duly sworn, testified as follows:

Interrogatory I. State your name, age and place of residence.

Int. II. Are you acquainted with the ranches of the plaintiff, W. A. Morris, and the intervener, T. N. Howell, situated in Bighorn County, State of Wyoming; if so, state how long you have been acquainted with said ranches.

Int. III. State whether you are acquainted with Sage Creek, which runs out of the State of Montana into the State of Wyoming and to or near to the said ranches of W. A. Morris and T. N. Howell.

195 Int. IV. How long have you been acquainted with said Sage Creek?

Int. V. State whether you are acquainted with the irrigating ditches of said W. A. Morris and said T. N. Howell, used by them upon their said respective ranches.

Int. VI. State particularly what acquaintance you have had with Sage Creek from the point of confluence of Pine Creek with Sage Creek to the point where said Sage Creek empties into the river.

Int. VII. State what is the formation or character of the bottom of said Sage Creek between the points above indicated.

Int. VIII. State what you may know in regard to whether the bed of Sage Creek between said points named is composed of gravel bars and quicksands so that the water sinks away and does not run as far as the ranches of W. A. Morris and T. N. Howell, during the irrigating season, or whether the water, if allowed to come down without being diverted from said stream, will flow to the ranches of said W. A. Morris and T. N. Howell in quantities sufficient to irrigate said ranches during the irrigating season. Give all the facts fully.

Int. IX. State what you may know as to the water reaching, during the irrigating season, the said ranches of W. A. Morris and T. N. Howell, before the said waters were appropriated by the defendants in the State of Montana.

Int. X. If in answer to the foregoing interrogatories you say that the water came down in sufficient quantities to irrigate the ranches of said W. A. Morris and T. N. Howell, give the years that to your knowledge the waters did so come down.

Int. XI. State whether you have had any experience in irrigating lands, and if so, state to what extent.

Int. XII. State the value of the water right of said W. A. Morris and T. N. Howell, respectively.

Int. XIII. Do you know or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this cause, or either or any of them, or that may be material to this your examination, or the matters in question in this cause? If yes, set forth the same fully and at large in your answer.

Interrogatories to be Propounded to the Witness James F. Howell.

Said witness JAMES P. HOWELL being duly sworn, testified as follows:

Interrogatory I. State your name, age and place of residence.
Int. II. Are you acquainted with the ranches of the plaintiff, W. A. Morris, and the intervener, T. N. Howell, situated in Big Horn County, State of Wyoming? If so, state how long you have been acquainted with said ranches.

Int. III. State whether you are acquainted with Sage Creek, which runs out of the State of Montana into the State of Wyoming and to or near to the said ranches of W. A. Morris and T. N. Howell.

Int. IV. How long have you been acquainted with said Sage Creek?

Int. V. State whether you are acquainted with the irrigating ditches of said W. A. Morris and said T. N. Howell, used by them upon their said respective ranches.

Int. VI. State particularly what acquaintance you have with said Sage Creek from the point of confluence of Pine Creek with said Sage Creek to the point where said Sage Creek empties into the river.

Int. VII. State what is the formation or character of the bottom of said Sage Creek between the points above indicated.

Int. VIII. State what you may know in regard to whether the bed of Sage Creek between said points named is composed of gravel bars and quicksands so that the water sinks away and does not run as far to the ranches of W. A. Morris and T. N. Howell during the irrigating season, or whether the water, if allowed to come down without being diverted from said stream, will flow to the ranches of said W. A. Morris and T. N. Howell in quantities sufficient to irrigate said ranches during the irrigating season. Give all the facts fully.

198 Int. IX. State what you may know as to the water reaching, during the irrigating season, the said ranches of W. A. Morris and T. N. Howell before said waters were appropriated by the defendants in the State of Montana.

Int. X. If in answer to the foregoing interrogatory you say that the water came down in sufficient quantities to irrigate the ranches of said W. A. Morris and T. N. Howell, give the years that to your knowledge the waters did so come down.

Int. XI. State whether you have had any experience in irrigating lands, and if so, state to what extent.

Int. XII. State the value of the water right of said W. A. Morris and T. N. Howell, respectively.

Int. XIII. Do you know or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this cause, or either or any of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yes, set forth the same fully and at large in your answer.

Interrogatories to be Propounded to the Witness Owen G. Norton.

Said witness OWEN G. NORTON being duly sworn, testified as follows:

Interrogatory I. State your name, age and place of residence.

Int. II. Are you acquainted with the ranches of the plaintiff, W. A. Morris, and the intervener, T. N. Howell, situated in
199 Big Horn County, State of Wyoming? If so, state how long you have been acquainted with said ranches.

Int. III. State whether you are acquainted with Sage Creek, which runs out of the State of Montana into the State of Wyoming and to or near to the said ranches of W. A. Morris and T. N. Howell.

Int. IV. How long have you been acquainted with said Sage Creek?

Int. V. State whether you are acquainted with the irrigating ditches of W. A. Morris and T. N. Howell, used by them upon their said respective ranches.

Int. VI. State particularly what acquaintance you have with said Sage Creek from the point of confluence of Pine Creek with Sage Creek to the point where said Sage Creek empties into the river.

Int. VII. State what is the formation or character of the bottom of said Sage Creek between the points above indicated.

Int. VIII. State what you may know in regard to whether the bed of Sage Creek between said points named is composed of gravel bars and quicksands so that the water sinks away and does not run as far as the ranches of W. A. Morris and T. N. Howell during the irrigating season, or whether the water, if allowed to come down without being diverted from said stream, will flow to the ranches of

said W. A. Morris and T. N. Howell in quantities sufficient
200 to irrigate said ranches during the irrigating season. Give all the facts fully.

Int. IX. State what you know as to the water reaching, during

the irrigating season, the said ranches of the said W. A. Morris and T. N. Howell before said waters were appropriated by the defendants in the State of Montana.

Int. X. If in answer to the foregoing interrogatory you say that the water came down in sufficient quantities to irrigate the ranches of said W. A. Morris and T. N. Howell, give the years that to your knowledge the waters did so come down.

Int. XI. State whether you have had any experience in irrigating lands, and if so, state to what extent.

Int. XII. State the value of the water right of said W. A. Morris and T. N. Howell respectively.

No cross-interrogatories on behalf of defendants represented by me.

O. F. GODDARD.

Int. XIII. Do you know or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this cause, or either or any of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yes, set forth the same fully and at large in your answer.

Interrogatories to be Propounded to Joseph H. Neville.

Interrogatory I. State your age, name and place of residence.

201 Int. II. What is your profession or occupation?

Int. III. If you state that you are a surveyor, state how much experience you had in said business.

Int. IV. State whether you have made a survey of the lands of the plaintiff W. A. Morris in the above-entitled cause, situated in the State of Wyoming, and involved in the foregoing lawsuit.

Int. V. If in answer to the foregoing question you state you have made such survey, state whether the same was made with a view to determine how much of said land can be covered by the water appropriated from Sage Creek by means of ditches constructed from a point on said Sage Creek to and upon the said lands of the plaintiff. Give all the data fully of your survey, and if you have made a plat showing the same, make exhibit thereof to this your deposition, marked Exhibit "A."

Int. VI. State whether you have likewise made a survey of the lands of the intervener, T. N. Howell, for the same purpose, and if so, give all the data of said survey showing the amount of land that can be covered by the ditches through which said intervener claims to have appropriated water from Sage Creek, and if you have made a plat thereof, attach the same to your deposition as Exhibit "B."

202 Int. VII. Do you know or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in

question in this cause? If yes, set forth the same fully and at large in your answer.

Certificate of Notary Public to Depositions of James F. Lampman et al.

STATE OF WYOMING.

County of Big Horn, ss:

I, C. B. King, a notary public in and for the county of Big Horn, State of Wyoming, do hereby certify that the witnesses, James F. Lampman, Charles A. Sarver, James F. Howell, Owen G. Norton and Joseph H. Neville in the foregoing depositions named, were each by me duly sworn to testify to the truth, the whole truth and nothing but the truth in said cause; that said depositions were taken in the office of Joseph H. Neville at Garland, Wyoming, on the 27th day of March, 1905, between the hours of 9 A. M. and 6 P. M.; that said depositions were reduced to writing under my direction, and when completed each was by me carefully read to said witnesses, and being by them corrected, was by each one subscribed in my presence. I further certify that I am not of counsel or an attorney for either of said parties to this action, and I am not interested in the event of said cause. I further certify that I placed such depositions
 203 in an envelope and sealed the same, and addressed the said envelope to the clerk of the United States Circuit Court at Helena, Montana, and deposited the same in the postoffice duly stamped, without being out of my possession after they were taken.

In witness whereof, I have hereunto subscribed my name and affixed my seal of office on this the 27th day of March, 1905.

[SEAL.]

C. B. KING,

*Notary Public in and for the State of
 Wyoming, County of Big Horn.*

My commission expires July, 23, 1907.

[Endorsed:] Title of Court and Cause. Stipulation. Filed Mar 29, 1905. Geo. W. Sproule, Clerk. By C. R. Garland, Deputy Clerk.

Deposition of James F. Lampman.

Said witness, JAMES F. LAPMAN, after being duly sworn, testified as follows:

Ans. to Int. No. 1. My name is James F. Lapman; age, 33 years; Garland, Wyoming.

Int. II. Yes, I am. I have known plaintiffs for seventeen years, and their ranches also.

Int. III. Yes, sir, I am.

Ans. Int. IV. Seventeen years.

Ans. Int. V. Yes, sir.

Ans. Int. VI. I am acquainted with Sage Creek by camping on said creek at different intervals and in various places and at different times for this last seventeen years.

204 Ans. Int. VII. The bed of said creek is earth and in some places some gravel.

Ans. Int. VIII. There are no quicksands between the mouth of Piney and the ranches of W. A. Morris and T. N. Howell, and if the water was allowed to run down without being diverted from said stream it would reach the ranches of W. A. Morris and T. N. Howell in quantities to irrigate said ranches in the irrigating season.

Ans. Int. IX. I have seen water flow in sufficient quantities during the irrigating season sufficient to irrigate the ranches of said W. A. Morris and T. N. Howell, before said waters were appropriated by the defendants in the State of Montana.

Ans. Int. X. During the years of 1888 to 1895 in sufficient quantity to thoroughly irrigate the ranches of said W. A. Morris and T. N. Howell.

Ans. Int. XI. I have had experience in irrigating, I have irrigated from 75 to 100 acres of land every year for thirteen years.

Ans. Int. XII. The value of a water right is whatsoever a ranch is worth without building and fences, for without water land in this section of the country is not worth the Government price of \$1.25 per acre, and the ranches of W. A. Morris and T. N. Howell in this locality where these ranches are located, land is worth and 205 would sell readily for a price, ranging from \$20.00 to \$30.00 per acre with a good and sufficient water right.

Ans. Int. XIII. I do know that W. A. Morris and T. N. Howell did raise good crops for a number of years and said crops were raised by irrigation of the waters of Sage Creek, prior to parties settling on Sage Creek in Montana, as I have frequently been upon the land and saw the crops growing and have seen the same harvested, and it has been a good yield.

JAMES F. LAMPMAN.

Subscribed in my presence and sworn to before me this 27th day of March, A. D. 1905.

[SEAL.]

C. B. KING,

Notary Public.

My commission expires July 23, 1907.

Deposition of Charles A. Sarver.

Said witness, CHARLES A. SARVER, after being duly sworn, testified as follows:

Ans. Int. I. Charles A. Sarver; age, 37 years; Garland, Wyoming.

Ans. Int. II. I am. Have known W. A. Morris and T. N. Howell and their ranches since September, 1892.

Ans. Int. III. I am.

Ans. Int. IV. Since Sept. 1892.

Ans. Int. V. I am.

206 Ans. Int. VI. I have camped from the mouth of Sage Creek to the point where Piney empties into Sage Creek at all seasons of the year for thirteen years.

Ans. Int. VII. Earth, sand and gravel.

Ans. Int. VIII. There are some gravel bars between the mouth of Piney and the ranches of W. A. Morris and T. N. Howell, but quicksands, and that the water would not sink any more through the bed of Sage Creek than it would in any other creek, and if the water was allowed to flow in the irrigating season it would reach the ranches of said W. A. Morris and T. N. Howell in sufficient quantities to thoroughly irrigate the same if unmolested by parties in Montana.

Ans. Int. IX. In the year 1892-93 there was plenty of water sufficiently irrigate the ranches of W. A. Morris and T. N. Howell. I have been present with Mr. Morris during the time of irrigating and saw the flow of water that was being used by Mr. Morris during the irrigating season of 1892-1893. This was before the waters were appropriated by parties in Montana.

Ans. Int. X. In 1892 and 1893 during the irrigating season.

Ans. Int. XI. Yes, since 1892 until 1891, in Big Horn County, Wyoming.

207 Ans. Int. XII. Whatsoever the value of the property without the fences or buildings, for lands in this section the country is worthless and would not be worth the taxes that are assessed against it without water to irrigate.

Ans. Int. XIII. At the time that Mr. Morris and T. N. Howell settled upon their land there was sufficient water flowing in Sage Creek to thoroughly and permanently irrigate the said ranches of W. A. Morris and T. N. Howell during the irrigating season. I was allowed to come down and it did flow during the time that I stated above and that I consider W. A. Morris' and T. N. Howell's ranches, they being located in a locality that is contiguous to a range of stock, would readily sell for \$40.00 an acre with a good and sufficient water right, and that there is upon W. A. Morris's ranch 20 acres that could be easily watered from Sage Creek if the water were not molested by parties in Montana.

CHARLES A. SARVER.

Subscribed in my presence and sworn to before me this 27th day of March, A. D. 1905.

[SEAL.]

C. B. KING,
Notary Public.

My commission expires July 23, 1907.

208

Deposition of James F. Howell.

Said witness, JAMES F. HOWELL, after being duly sworn, testified as follows:

Ans. Int. I. James F. Howell; age, 40; Garland, Wyoming.

Ans. Int. II. Yes, since 1892.

Ans. Int. III. I am.

Ans. Int. IV. Since 1892.

Ans. Int. V. I am.

Ans. Int. VI. My acquaintance was caused by traveling up and down Sage Creek and camping on the same at different intervals and

by herding and watering sheep on Sage Creek during the years 1892-93.

Ans. Int. VII. Earth, mud, and some very little sand and gravel.

Ans. Int. VIII. There are a very small portion of sand and gravel, and no quicksand, and that the creek does not sink between those points named and if the water was unmolested by parties in Montana, it would flow in sufficient quantities during the irrigating seasons to thoroughly and permanently irrigate the ranches of the said W. A. Morris and T. N. Howell.

Ans. Int. IX. Prior to the appropriation of the water by parties in Montana the said W. A. Morris and T. N. Howell had sufficient water to thoroughly irrigate their ranches during the irrigating season.

209 Ans. Int. X. The waters did flow onto the said ranches in the years 1892-3 in sufficient quantities to thoroughly irrigate the same.

Ans. Int. XI. I have had a little experience in irrigating, but have often times been present and saw other people irrigate and have a good idea as to what an irrigating stream would consist of.

Ans. Int. XII. A water right, the value of which is the amount that you could get for your ranch per acre less the improvements thereon in the way of buildings and fences, for in this locality land is considered worthless without water and would not sell for the price the Government asks for it, but those ranches with a good and sufficient amount of water to sufficiently irrigate would bring upon the market to-day the price of \$30.00 per acre.

Ans. Int. XIII. No.

JAMES F. HOWELL.

Subscribed in my presence and sworn to before me this 27th day of March, A. D. 1905.

[SEAL.]

C. B. KING,
Notary Public.

My commission expires July 23, 1907.

210 *Deposition of Owen G. Norton.*

Said witness, OWEN G. NORTON, after being sworn, testified as follows:

Ans. Int. I. Owen G. Norton, age, 52 years old; Garland, Wyoming.

Ans. Int. II. I am acquainted with said ranches since April, 1902.

Ans. Int. III. I am.

Ans. Int. IV. Since April, 1902.

Ans. Int. V. I am.

Ans. Int. VI. I am acquainted with Sage Creek from the mouth of Piney to the end of Sage Creek where it empties into the river.

Ans. Int. VII. It is almost exclusively mud.

Ans. Int. VIII. There is no quicksand on the creek, the only gravel is between Morris' ranch and the Howell ranch. And the water would flow if unmolested by parties in Montana, to the ranches of W. A. Morris and T. N. Nowell in sufficient quantities to irrigate the said ranches during the irrigating season.

Ans. Int. IX. I do not know, as I was not in the State at that time.

Ans. Int. X. I do not know, I was not in the State at that time.

Ans. Int. XI. Have had none.

211 Ans. Int. XII. The value of the water right is what the ranch would sell for, for without water a ranch is worthless, and would not pay the prices of the taxes assessed against it.

Ans. Int. XIII. No.

OWEN G. NORTON.

Subscribed in my presence and sworn to before me this the 27th day of March, A. D. 1905.

[SEAL.]

C. B. KING,
Notary Public.

My commission expires July 23, 1907.

Deposition of Joseph H. Neville.

Said witness, JOSEPH H. NEVILLE, after being duly sworn, testified as follows:

Ans. Int. I. Joseph H. Neville; age 52; Garland, Wyoming.

Ans. Int. II. Surveyor.

Ans. Int. III. I have had twenty years' experience.

Ans. Int. IV. I have made a survey of W. A. Morris' ranch.

Ans. Int. V. I have made a survey of the ditches and the land embraced in W. A. Morris' ranch and I find from the actual survey that the whole of W. A. Morris' ranch could be watered by his main ditch, with laterals constructed therefrom if there were water

212 sufficient in Sage Creek during the irrigating season, as Mr. Morris' main ditch at the point of diversion from Sage Creek

has a capacity sufficient to carry the water allowed under the statute of the State of Wyoming, it being one cubic foot second for every seventy acres and that there are strong evidence- of irrigation on the lands of W. A. Morris as my plat which I offer in evidence and marked Exhibit "A" shows the ditches and laterals as they now exist upon said ranch.

Ans. Int. VI. I have also made a survey of the ranch of T. N. Howell for the purpose of ascertaining the amount of land that can be watered from the ditches that are now placed upon the land of the said T. N. Howell ranch. And I find that it has an area of 237 acres and that I have made a plat thereof and attach the same to my deposition as Exhibit "B."

Ans. Int. VII. Yes, the lands on the T. N. Howell ranch show marks of cultivation and irrigation and that it is all surrounded by a ditch and can be watered in fine shape if the water was allowed to flow thereon.

JOSEPH H. NEVILLE.

Subscribed in my presence and sworn to before me this the 27th day of March, A. D. 1905.

[SEAL.]

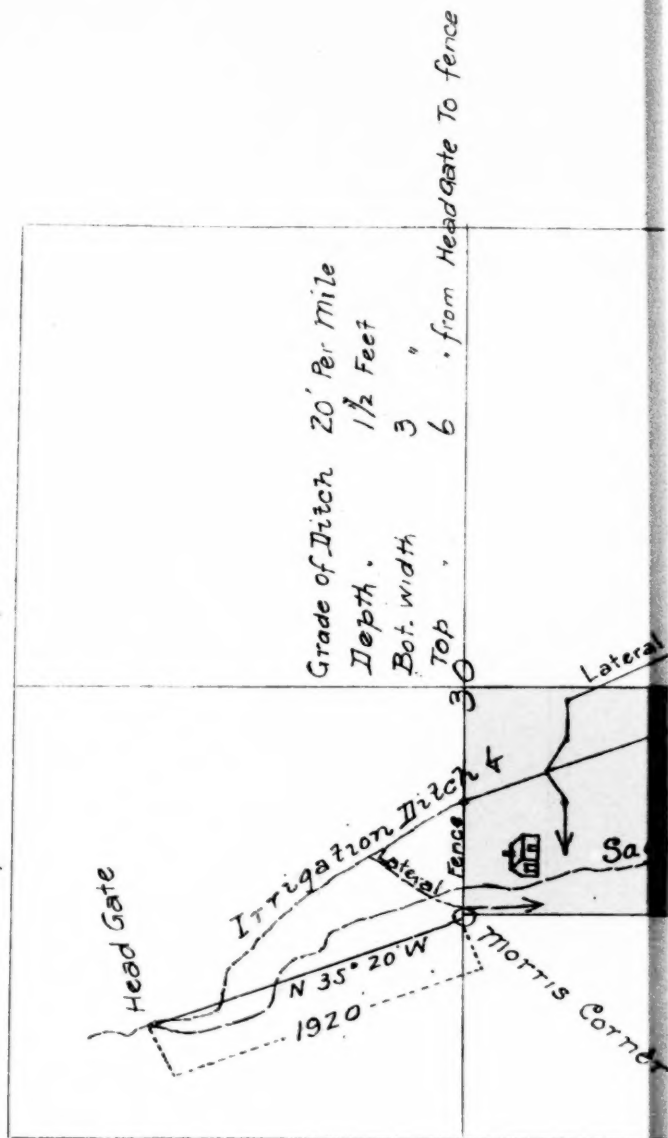
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Notary Public.

My commission expires July 23, 1907.

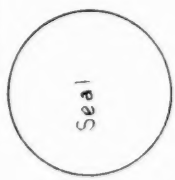
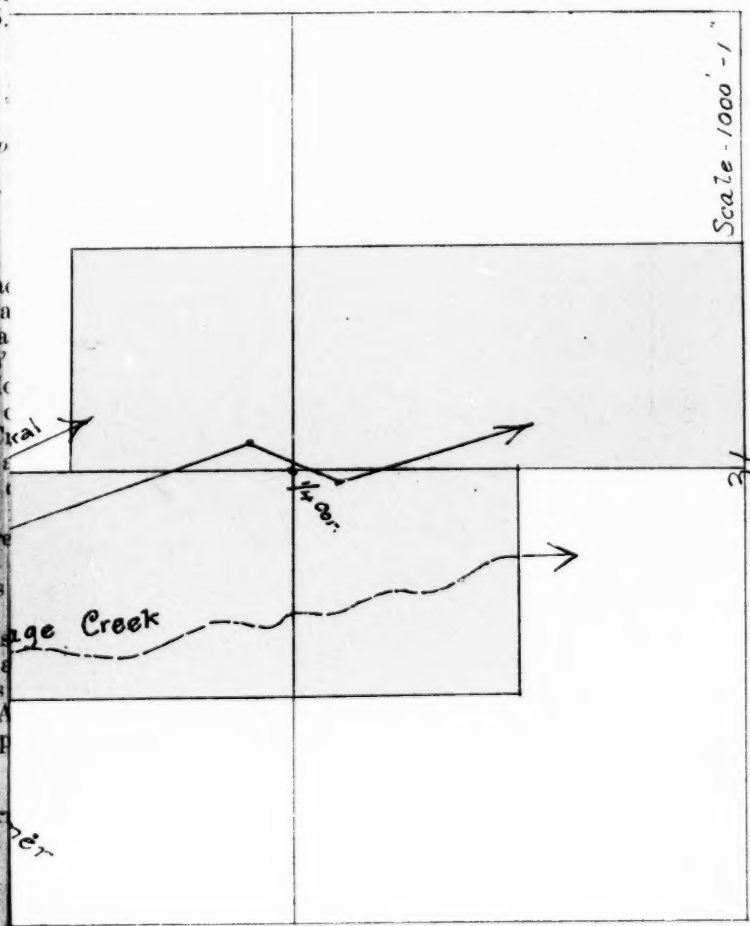
(Here follow diagrams marked pp. 213 & 214.)

Plan of W.A. Morris Irrigation Works

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Filed March 27, 1905
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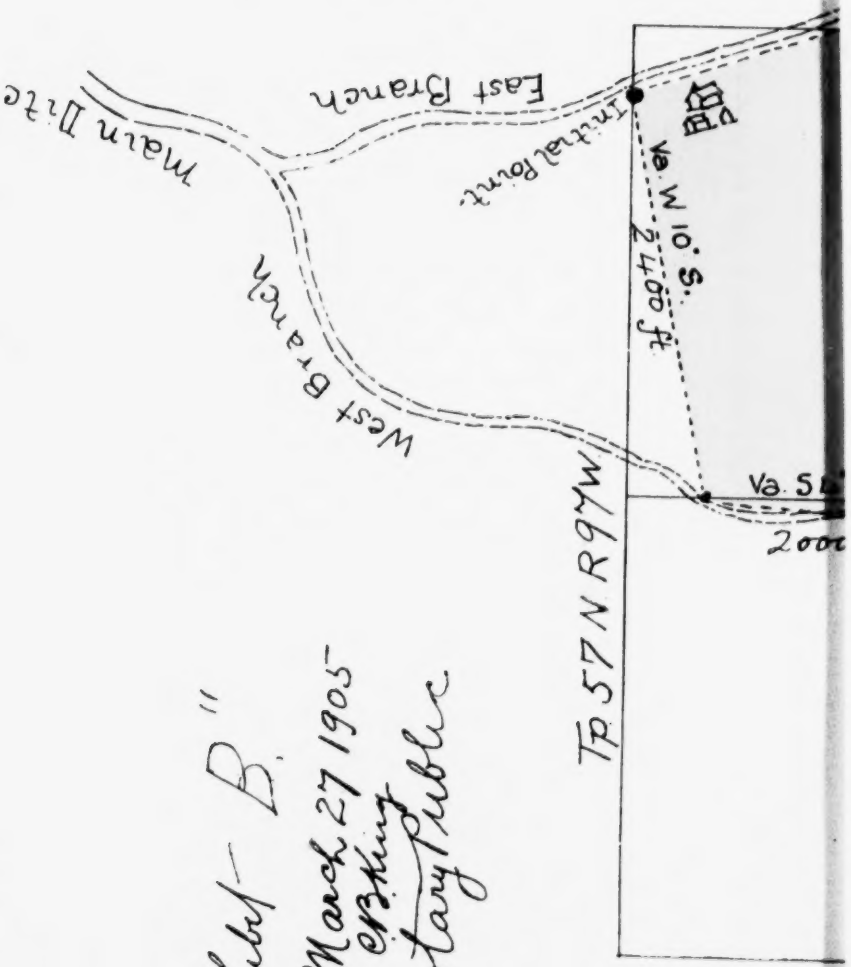
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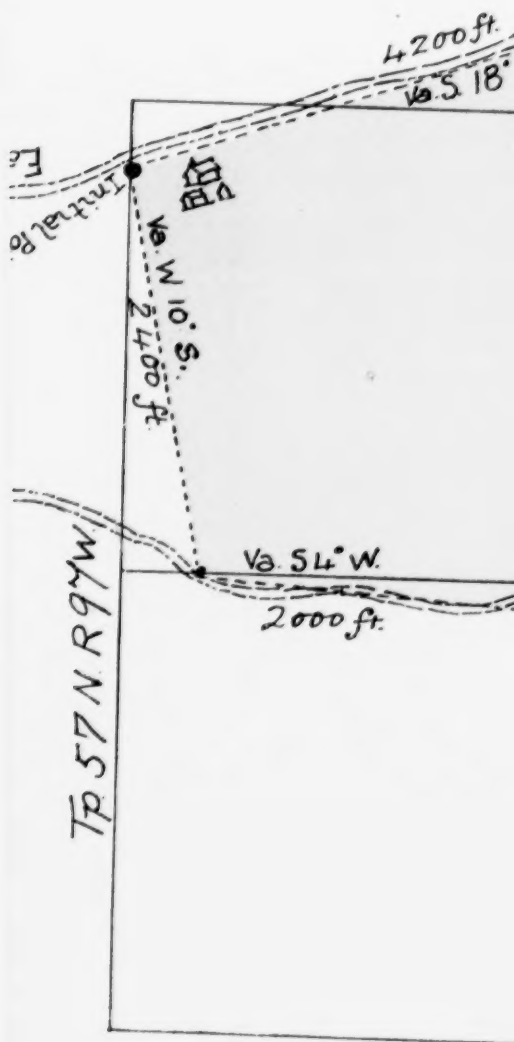
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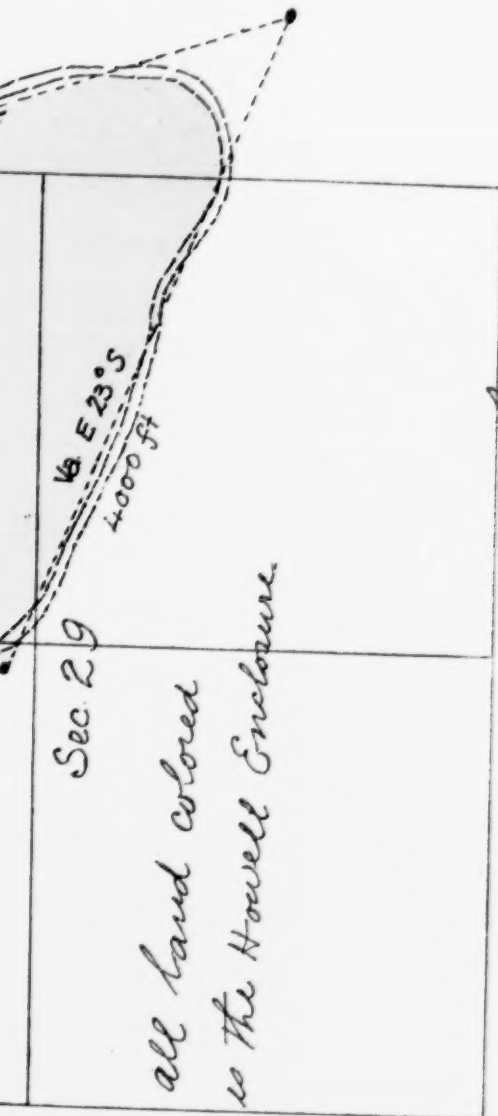
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"Exhibit B."
 Filed March 27 1905
 at King
 Notary Public



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215 [Endorsed:] Title of Court and Cause. Depositions of
 J. F. Lapman, C. A. Sarver, J. F. Howell, O. G. Norton, and
 J. H. Neville. Filed and Entered Mar. 29, 1905. Geo. W. Sproule,
 Clerk. By C. R. Garlow, Deputy Clerk.

And thereafter, to wit, on the 17th day of April, A. D. 1905, stipu-
 lation as to and depositions of R. B. Heritage and J. M. Howell were
 filed herein, as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of
 Montana.

WILLIAM A. MORRIS, Plaintiff,

vs.

J. N. BEAN et al., Defendant.

*Stipulation Relative to Depositions of Richard Heritage and Joseph
 N. Howell.*

It is hereby stipulated by and between counsel for the plaintiff and
 intervener and counsel for the defendants that the depositions of
 Richard B. Heritage and Joseph M. Howell may be filed as deposi-
 tions in this case and read by either party upon the hearing,
 216 subject to all objections upon the score of competency.

This — day of April, 1905.

J. R. GOSS,

McCONNELL & McCONNELL,

Attorneys for Plaintiff and Intervener.

O. F. GODDARD,

Attorney for J. A. King, C. H. Young, and Michael Wrote.

GEO. W. PIERSON,

Attorney for S. W. Bent, Wallace Bent, J. N. Bean,

Corbett Bennett, and William Bainbridge.

Deposition of Richard B. Heritage.

Said witness, RICHARD B. HERITAGE, after being duly sworn,
 testified as follows:

Ans. Int. I. Richard B. Heritage, age, 42 years; Byron, Wyoming.

Ans. Int. II. I am. Have known said ranches since 1888.

Ans. Int. III. Yes, I am.

Ans. Int. IV. Since 1888.

Ans. Int. V. I am.

Ans. Int. VI. By herding of sheep and camping on said creek.

Ans. Int. VII. Mud, earth and a very little sand.

217 Ans. Int. VIII. There are no quicksands, some few little gravel
 points, but if the water was allowed to flow, it would reach
 the ranches of W. A. Morris and T. N. Howell in sufficient
 quantities to thoroughly irrigate the said ranches during the
 irrigating season.

Ans. Int. IX. Prior to the water being appropriated by the defendants in the State of Montana the water of Sage Creek did flow in sufficient quantity to thoroughly irrigate the said ranches of W. A. Morris and T. N. Howell during the year of 1892.

Ans. Int. X. From the year 1888 to 1892.

Ans. Int. XI. Yes, I have had considerable experience in irrigating, I own a ranch of 160 acres and I water about 60 to 65 acres of said ranch, and have done so for five years.

Ans. Int. XII. The water right is considered to be worth whatever a ranch would bring upon the market without any improvements in the shape of buildings and fences, for without water sufficient to thoroughly irrigate a ranch the ranch is worthless.

Ans. Int. XIII. Yes, in the fall of 1888, I was camped below the mouth of Piney near the ranch of Mr. Morris' and caught some large sized trout from the stream or Sage Creek, and that there was plenty of water at that time, and if Sage Creek had contained quicksand and the water had sunk between those points named it would have been impossible for trout to have been found in said stream.

RICHARD B. HERITAGE.

Subscribed in my presence and sworn to before me this 27th day of March, A. D. 1905.

[SEAL.]

C. B. KING,
Notary Public.

My commission expires July 23, 1907.

Deposition of Joseph M. Howell.

Said witness, JOSEPH M. HOWELL, after being duly sworn, testifies as follows:

Ans. Int. I. Joseph M. Howell; age, 32; Garland, Wyoming.

Ans. Int. II. Yes, sir, I have been acquainted with them since 1892.

Ans. Int. III. I am.

Ans. Int. IV. Since 1892.

Ans. Int. V. I am.

Ans. Int. VI. My acquaintance with Sage Creek was had by me while camping and herding sheep on said creek during the seasons of 1892, 1893 and 1894, and I know every foot of the creek from where it raises in Montana to where it empties into the river in Wyoming.

Ans. Int. VII. The bed of the Sage Creek consists of mud, earth, sand and gravel.

219 Ans. Int. VIII. There are no gravel bars and quicksands that would cause the water to sink away, and if the water was allowed to flow, it would reach the ranches of W. A. Morris and T. N. Howell during every irrigating season in sufficient quantities to thoroughly irrigate said ranches.

Ans. Int. IX. Before the waters were appropriated by the defendants in the State of Montana the flow of water was in abundance,

more than would be necessary to irrigate the ranches of W. A. Morris and T. N. Howell during any irrigating season.

Ans. Int. X. Yes, in 1892-93 in sufficient quantities to irrigate the said ranches of W. A. Morris and T. N. Howell.

Ans. Int. XI. Yes, I have had some little experience in irrigating but to no great extent, but have seen and been present on several ranches that was being irrigated and have noticed the head of water used by the party irrigating.

Ans. Int. XII. A water right is worth whatsoever the ranch or ranches would sell for, for a ranch without water is worthless and no one could exist on the same, and either of those ranches would sell quick for \$20.00 or \$30.00 an acre, as they are in a good locality, and consist of very rich soil.

Ans. Int. XIII. Yes, if the water was allowed to flow to the ranches of W. A. Morris and T. N. Howell as it did in the years 1892-93, good and sufficient crops could be raised from the above-named ranches, but as it is at this present time without water the ranches are worthless.

JOSEPH M. HOWELL.

Subscribed in my presence and sworn to before me this 27th day of March, A. D. 1905.

[SEAL.]

C. B. KING,
Notary Public.

My commission expires July 23, 1907.

[Endorsed:] Title of Court and Cause. Stipulation and Depositions. Filed and Entered April 17, 1905. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 7th day of June, A. D. 1905, the stipulation and depositions of J. A. King et al. were filed herein, as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

WILLIAM A. MORRIS, Plaintiff,

vs.

J. N. BEAN, JOHN SADRING, et al., Defendants; THOMAS N. HOWELL, Intervener.

221 *Stipulation Relative to Taking of Depositions of Allen P. Graham et al.*

It is hereby stipulated by and between counsel for the parties to the above-entitled cause that the defendants J. A. King, Michael Wrote and C. H. Young, may take the depositions of the following witnesses on their behalf or on behalf of any one or more of said defendants, to wit, Allen P. Graham, John Miner, J. H. Graham, and any other witnesses which said defendants or any of them may produce, before Harry L. Wilson, a notary public in and for Yellow-

stone County, Montana, at his office in the First National Bank Block in the city of Billings, in said county, on any day or days between the date of this stipulation and the trial of said cause, subject to the same objections as if the witness- were present in court and testifying in said cause, said depositions to be taken on interrogatories and cross-interrogatories to be propounded to said witness.

J. R. GOSS,

McCONNELL & McCONNELL,

Attorneys for Plaintiff and Intervener.

O. F. GODDARD,

Attorney for Defendants King, Wrote, and Young.

GEO. W. PIERSON,

Attorney for Defendants J. N. Bean, Wallace Bent, S. W.

Bent, Corbett Bennett, and William Bainbridge.

222 In the Circuit Court of the United States, Ninth Circuit,
District of Montana.

WILLIAM A. MORRIS, Plaintiff,

vs.

J. N. BEAN, JOHN SADRING, et al., Defendants; THOMAS N. HOWELL,
Intervener.

*Interrogatories to be Propounded to John Miner, a Witness on
Behalf of the Defendant C. H. Young.*

Be it remembered, that on the third day of May, 1905, before Harry L. Wilson a notary public in and for Yellowstone County, Montana, at his office in the city of Billings, pursuant to the stipulation hereto attached and duly signed by counsel for the respective parties, the following depositions were taken on behalf of the defendants, to-wit:

*Interrogatories to be Propounded to John Miner, a Witness on Behalf
of the Defendant C. H. Young.*

Interrogatory 1. State your name, age, place of residence and occupation.

Int. 2. State if you ever resided on Piney or Sage Creek, in the State of Montana, and if so when.

223 Int. 3. I hand you a paper purporting to be a copy of water right executed by you. State whether you executed the original of which this paper is a copy.

(Defendant Young asks to have the copy of water right notice marked Exhibit "A" and attached to this deposition.)

Int. 4. State what if any notice of water right you posted in making the appropriation of water mentioned in notice marked Exhibit "A," and if you say you posted a notice state whether or not it was a similar notice to Exhibit "A" and where and when you posted it.

Int. 5. State if you ever constructed a ditch for irrigating the lands mentioned in Exhibit "A," and if so state when you commenced work on said ditch, when you completed it, give the depth and width of said ditch and the length thereof.

Int. 6. State whether or not you ever run water through said ditch onto the lands described in said notice, and if so state when you first turned the water onto said lands and to what extent.

Int. 7. State if you ever irrigated said lands or any of them and if so how many acres, and during what years.

Int. 8. State what crops you raised on said lands by irrigation from the ditch you described.

224 Int. 9. State when you parted with the possession and the title to the said ditch and water right and the lands therein described if at all, and to whom.

Int. 10. State if you are acquainted with the defendant C. H. Young, and if so where and how long you have known him.

Int. 11. State if you are acquainted with the lands claimed by the defendant C. H. Young and described in his answer, in this cause, if so how long the defendant has resided on said lands, and what use he has made of the lands.

Int. 13. State if to your knowledge this defendant has ever irrigated said lands by means of a ditch constructed by you mentioned in your former answers, and if so when did the defendant Young first irrigate said lands or any of them from said ditch?

Interrogatories to be Propounded to said Witness on the Part of the Defendant J. A. King.

Interrogatory 1. State if you are acquainted with the defendant J. A. King, and if so how long you have known him.

Int. 2. State if you are acquainted with the lands on which he now resides which are described in his answer in this case.

Int. 3. State if you know when the defendant King first settled on said lands and first irrigated any of said lands from Piney Creek.

225 Int. 4. State if you know who constructed the ditch of the defendant King with which he has been irrigating his lands where he now resides, and if so when the same was commenced and when finished.

Int. 5. State if you know when the lands upon which the defendant now resides were first irrigated with the waters of Piney Creek through the ditch you have mentioned.

Interrogatories to be Propounded to said Witness on Behalf of the Defendant Michael Wrote.

Int. 1. State if you are acquainted with the defendant Michael Wrote, and if so where and how long you have known him.

Int. 2. State if you know when the defendant Michael Wrote first settled upon the lands upon which he now resides.

Int. 3. State if the defendant Wrote to your own knowledge has

ever irrigated his lands where he now resides from the waters of Sage Creek, and if so when he first irrigated said lands or any part of them from said Sage Creek and by what means.

Int. 4. State if you know when Michael Wrote constructed his ditch from Sage Creek for irrigating his said lands, and when he first turned water into said ditch for that purpose.

226 *Interrogatories to be Propounded to George Teeple, a Witness on Behalf of the Defendant C. H. Young.*

Interrogatory 1. State if you are acquainted with the defendant C. H. Young, and if so how long you have known him.

Int. 2. State if you are acquainted with the lands on which he now resides which are described in his answer in this case.

Int. 3. State if you know when the defendant Young first settled on said lands, and first irrigated any of said lands from Piney Creek.

Int. 4. State if you know who constructed the ditch of the defendant Young with which he has been irrigating his lands where he now resides, and if so when the same was commenced and when finished.

Int. 5. State if you know when the lands upon which the defendant now resides were first irrigated with the waters of Piney Creek through the ditch you have mentioned.

Interrogatories to be Propounded to said Witness on Behalf of the Defendant Michael Wrote.

Interrogatory 1. State if you are acquainted with the defendant Michael Wrote, and if so where and how long you have known him.

Int. 2. State if you know when the defendant Michael Wrote first settled upon the lands upon which he now resides.

227 Int. 3. State if the defendant Wrote to your knowledge has ever irrigated his lands where he now resides from the waters of Sage Creek, and if so when he first irrigated said lands or any part of them from the waters of said Sage Creek, and by what means.

Int. 4. State if you know when Michael Wrote constructed his ditch from Sage Creek for irrigating his said lands, and when he first turned water into said ditch for that purpose.

Interrogatories to be Propounded to said Witness on the Part of the Defendant J. A. King.

Interrogatory 1. State if you are acquainted with the defendant J. A. King, and if so how long you have known him.

Int. 2. State if you are acquainted with the lands on which he now resides which are described in his answer in this case.

Int. 3. State if you know when the defendant King first settled on said lands, and first irrigated any of said lands from Piney Creek.

Int. 4. State if you know who constructed the ditch of the defendant King with which he has been irrigating his lands where he now resides, and if so when the same was commenced and when finished.

228 Int. 5. State if you know when the lands upon which the defendant now resides were first irrigated with the waters of Piney Creek through the ditch you have mentioned.

Interrogatories to be Propounded to Allen P. Graham on Behalf of the Defendant J. A. King.

Interrogatory 1. State your name, age, place of residence and occupation.

Int. 2. State, if you know, the lands upon which the defendant, J. A. King, now resides and which are described in his answer in this case.

Int. 3. State if you constructed or assisted in constructing a ditch from Piney Creek, a tributary of Sage Creek, for the irrigation of said lands or any of them, and if so when you commenced work on said ditch and when you finished it, and who assisted you, if anyone, in the construction of said ditch, and when water was first turned into said ditch and conveyed thereby to the lands of the defendant King.

Int. 4. State the dimensions of said ditch giving its depth, width and length.

Int. 5. State, if you know, whether the ditch you constructed or assisted in constructing described by you in your last answers was ever used for irrigating said lands or any of them by you, and if so when did you irrigate said lands or any of them first from said ditch, and to what extent?

Int. 6. State when you parted with the possession of said lands and ditch, and who succeeded you in the possession thereof.

229 Int. 7. If you say the defendant King succeeded you in the possession of said ditch and lands, state when that was.

Int. 8. State whether or not you know of your own knowledge that the defendant King has ever irrigated his said lands from said ditch you have described, and if so when did he first irrigate the said lands from said ditch, and what years since that time has he so irrigated the said lands?

Int. 9. State how long the defendant King has resided on said lands and to what extent he has irrigated and farmed the same since his first settlement on said lands.

Interrogatories to be Propounded to said Witness on Behalf of the Defendant C. H. Young.

Int. 1. State if you are acquainted with W. D. Story, and if so where and how long have you known him?

Int. 2. State if W. D. Story settled upon Piney Creek a branch of Sage Creek in Montana, and if so when and where.

Int. 3. State whether or not the lands settled on by said Story were the same lands that are now owned and claimed by the defendant C. H. Young.

Int. 4. State if you know what the said Story did after his settle-

230 ment on said Piney Creek with reference to the appropriation of any water from said creek and the building of any ditch from said Creek onto the said lands.

Int. 5. If you say he constructed a ditch from Piney, state when he constructed it, and state if you know when he first turned water into it from said Piney Creek, and to what extent he irrigated said lands from said ditch if at all.

Int. 6. State who succeeded the said Story in the possession of said lands and ditch if you know, and when said Story was succeeded in the possession thereof.

Int. 7. If you say he was succeeded in the possession of said lands and ditch by the defendant Young, you may state if, to your knowledge, the said Young has resided on said lands since that time and if so what portion of the time since he settled on said lands.

Int. 8. State to what extent the said Young has used the waters of said Piney Creek for irrigating said lands and what years he has so used said waters.

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

WILLIAM A. MORRIS, Plaintiff,

vs.

J. N. BEAN, JOHN SADRING et al., Defendants; THOMAS N. HOWELL, Intervener.

231 *Cross-Interrogatories Proposed by Defendants J. N. Bean, S. W. Bent, Wallace Bent, Corbett Bennett, and William Bainbridge to be Propounded to Witness John Miner on Behalf of Defendant C. H. Young.*

Cross-Interrogatory No. 1. State how many acres of land on Piney Creek, referred to in your testimony, were fenced by W. D. Story when he first settled on this stream.

Cross-Interrogatory No. 2. How many acres of crop did W. D. Story raise each year with the waters of Piney Creek? Name kind and acreage grown each year.

Cross-Interrogatories Proposed by Defendants J. N. Bean, S. W. Bent, Wallace Bent, Corbett Bennett, and William Bainbridge to be Propounded to Witness Allen P. Graham on Behalf of the Defendant C. H. Young.

Cross-Interrogatory No. 1. How many acres of land on Piney Creek did you include under fence prior to the time of filing your notice of appropriation?

Cross-Interrogatory No. 2. How many acres of land did you have under ditch, which were fenced at the time you first turned water from Piney Creek through your ditch?

232 Cross-Interrogatory No. 3. How many acres of crops did you raise each year? Name kinds of crops and acreage for each year.

Submitted by,

GEO. W. PIERSON,

*Attorney for J. N. Bean, Corbett Bennett, Wallace
and S. W. Bent, and William Bainbridge.*

Deposition of John Miner on Behalf of C. H. Young.

Answer to Interrogatory 1. John Miner; age, sixty-three; residence, Silesia, Carbon County, Montana; farmer and stock-raiser.

Answer to Int. 2. I resided on Piney Creek in the State of Montana, from June 1893, to Oct. 1894.

Answer to Int. 3. Yes, sir.

(Copy of water right referred to in Int. 3 marked Exhibit "A" to deposition of John Miner.)

Answer to Int. 4. On June 30th, 1893, I posted on the headgate of my ditch as a notice of my water right an exact copy of the notice above referred to as Exhibit "A." The headgate on which I posted the notice is on Piney Creek about one mile above my ranch in Carbon County, Montana.

Answer to Int. 5. Yes, sir. I commenced work on the ditch July 1st, 1893, and completed it the same day. The ditch was about two feet wide on the bottom and from ten to twelve inches deep; it was about a half a mile long.

233 Answer to Int. 6. Yes, sir. I turned the water onto the lands July 1st, 1893. I ran from 160 to 180 inches of water and irrigated from 60 to 80 acres of land.

Answer to Int. 7. I irrigated from 60 to 80 acres during the years 1893 and 1894.

Answer to Int. 8. Garden and blue-stem hay.

Answer to Int. 9. About April 1st, 1895, to W. D. Story of Park City, Montana.

Answer to Int. 10. Yes, sir; in Yellowstone and Carbon Counties, Montana, for eight years.

Answer to Int. 11. Yes, sir; about seven years; raised garden, sown alfalfa, and cut wild hay.

Answer to Int. 12. I have seen water in this ditch at different times since the defendant Young has been in possession of the lands; the first time was in June, 1899, which was the first time I visited the place after leaving there in 1895.

Deposition of John Miner on Behalf of J. A. King.

Answer to Int. 1. Yes, sir; eleven years.

Answer to Int. 2. Yes, sir.

Answer to Int. 3. About January, 1894, and irrigated lands the same year.

Answer to Int. 4. The defendant J. A. King, either in the fall of

1892 or the spring of 1893; I saw water in this ditch in the month of June, 1893; the ditch is $3\frac{1}{2}$ or 4 miles long.

Answer to Int. 5. 1894.

234 *Deposition of John Miner on Behalf of Michael Wrote.*

Answer to Int. 1. Yes, sir; on Sage Creek, Carbon County, Montana, for eleven or twelve years.

Answer to Int. 2. I think in the year 1893.

Answer to Int. 3. Yes, sir, by means of a ditch tapping Sage Creek; I do not know when he first irrigated, but I saw him using water there in the spring of 1894.

Answer to Int. 4. I do not know.

JOHN MINER.

Subscribed and sworn to before me this 3d day of May, 1905.

[L. s.]

HARRY L. WILSON,

Notary Public in and for Yellowstone County, Montana.

Answer to Cross-Interrogatories Propounded to John Miner.

Answer to Cross-Int. 1. I had none of it fenced, but had taken up a homestead of 160 acres, 140 or 150 acres of which were under my ditch and could be irrigated from it.

Answer to Cross-Int. 2. Answered in above answer to Cross-Interrogatory 1. I had none of the land fenced when I first turned the water into my ditch.

235 Answer to Cross-Int. 3. In 1893 I raised nothing but a garden covering about an acre of ground. In 1894 I raised the same amount of garden and about sixty acres of mixed wild hay, from which I cut about thirty tons.

JOHN MINER.

Subscribed and sworn to before me this 3d day of May, 1905.

[L. s.]

HARRY L. WILSON,

Notary Public in and for Yellowstone County, Montana.

EXHIBIT "A" TO DEPOSITION OF JOHN MINER.

H. L. W.

STATE OF MONTANA,

County of Yellowstone, ss:

To All Whom These Presents May Concern:

Be it remembered, that I, John Miner, of Piney Creek, in the County of Yellowstone and State of Montana, do hereby declare and give notice to all persons concerned that I have appropriated one hundred and fifty (150) inches of the waters of Piney Creek in the County of Yellowstone and State of Montana, for useful and beneficial purposes. And I do hereby declare as follows:

First. That I do hereby claim one hundred and fifty inches of the waters of said Piney Creek according to the standard measure
 236 of water prescribed by Section 1262 of chapter LXXIV of the fifth Division of the General Laws, compiled Statutes of Montana.

Second. That the purpose for which said water is claimed is for irrigation and other purposes and especially for irrigating my homestead claim consisting of one hundred and sixty acres of land (unsurveyed) lying on both sides of said Piney Creek but principally on the northwest side of said Creek and about 2 miles below where said Creek leaves its canyon which is the place of intended use.

Third. That said waters are diverted from said stream by means of a dam or ditch tapping said stream upon its northwest bank at a point therein situate directly opposite the points of rock which form the lower end of the canyon of Piney Creek, said ditch being the ditch of George Teeples which said ditch has been by me widened and extended and which said ditch runs from the point of diversion in a westerly direction to and upon the said above described land. That the size of said ditch is about thirty-six (36) inches in width at the bottom thereof and about sixty (60) inches across the top thereof, by about eighteen (18) inches in depth.

Fourth. That said appropriation was made upon the 27th day of June, A. D. 1893.

Fifth. That the name of the appropriator of said water is John Miner.

237 And I do hereby further claim the right to change the place of diversion of said water at any time, and to extend the ditches, flumes, piles and aqueducts by which said diversion is made from time to time to any place other than where first used, and to use the waters for other useful and beneficial purposes than that for which it was first appropriated.

And I also claim all the rights of way for ditches, flumes, aqueducts and reservoirs, dikes and canals over and across the lands through which they are constructed, and the right to enlarge and alter the same from time to time, and also all rights, easements, privileges and appurtenances thereunto belonging or granted under and by virtue of all laws both state and national.

Together with all and singular the hereditaments and appurtenances thereunto belonging or appertaining or to accrue to the same.

In witness whereof, I have hereunto set my hand and seal this twenty-eighth day of June, A. D. 1893.

JOHN MINER. [SEAL.]

STATE OF MONTANA,

County of Yellowstone, ss:

John Miner being duly sworn, deposes and says, that he is of lawful age and the locator and appropriator of the waters and water right in the foregoing notice of water appropriation named; that he has read the foregoing notice of appropriation and knows the
 238 contents thereof; that the matters and things contained in said notice are true.

JOHN MINER.

Subscribed and sworn to before me this 28th day of June, A. D. 1893.

J. B. HERFORD,
Notary Public.

Filed for record this 5th day of July, A. D. 1893, at 9:15 o'clock
A. M. W. E. Frizelle, County Recorder.

Deposition of George Teeple on Behalf of C. H. Young.

Answer to Int. 1. Yes, sir; about eight years.

Answer to Int. 2. Yes, sir.

Answer to Int. 3. In the spring 1898; defendant Young first irrigated his lands from Piney Creek in the spring of 1898.

Answer to Int. 4. John Miner; about the first of July, 1893, it was commenced; I was there when Miner commenced to build the ditch, then went away for three days and when I returned the ditch was completed and water being used in it.

Answer to Int. 5. As soon as the ditch was finished, about the first of July, 1893.

Deposition of George Teeple on Behalf of Michael Wrote.

Answer to Int. 1. Yes, sir, on Sage Creek in Carbon County, Montana, since 1892.

239 Answer to Int. 2. In the month of December, 1892.

Answer to Int. 3. Yes, sir, by means of a ditch which he took out in June, 1893, and he first irrigated the lands the summer of 1893.

Answer to Int. 4. The answer to this interrogatory is covered in the preceding answer.

Deposition of George Teeple on Behalf of J. A. King.

Answer to Int. 1. Yes, sir; since the month of December, 1892.

Answer to Int. 2. Yes, sir.

Answer to Int. 3. January 1st, 1894, and irrigated the land the same year.

Answer to Int. 4. Graham Brothers, employed by the defendant King; the ditch was commenced in May, 1893, and finished in the spring, of 1894.

Answer to Int. 5. In May or June, 1894.

GEORGE TEEPLES.

Subscribed and sworn to before me this 3d day of May, 1905.

[L. s.]

HARRY L. WILSON,
Notary Public in and for Yellowstone County, Montana.

240 *Deposition of Allen P. Graham on Behalf of J. A. King.*

Answer to Int. 1. Allen P. Graham; age, 32; Bowler, Montana; rancher.

Answer to Int. 2. Yes, sir.

Answer to Int. 3. My uncle, A. B. Graham, and myself constructed a ditch from Piney Creek for the irrigation of the lands of J. A. King. We commenced work in May, 1893, and finished the ditch in the spring of 1894; the ditch was about four miles in length; water was turned into the ditch immediately after it was completed.

Answer to Int. 4. About 3 or 3½ feet wide on the bottom, ten inches deep, and about four miles long.

Answer to Int. 5. Yes, sir, in the summer of 1894; about 150 acres of meadow.

Answer to Int. 6. I never owned the lands or ditch referred to.

Answer to Int. 7. Answered above.

Answer to Int. 8. Yes, sir, first in the spring of 1894 and every year since then.

Answer to Int. 9. Since the spring of 1894; at least 150 acres of the land have been continuously irrigated and farmed in meadow grass, alfalfa, garden, wheat, oats and other small grains.

241 *Deposition of Allen P. Graham on Behalf of C. H. Young.*

Answer to Int. 1. Yes, sir, since the spring of 1894, in Yellowstone and Carbon counties, Montana.

Answer to Int. 2. Yes, sir, in April, 1895, on the John Miner place about three miles below the head of Piney Creek in Carbon County, Montana.

Answer to Int. 3. Yes, sir.

Answer to Int. 4. John Miner built a ditch on this place in 1893 from Piney Creek and turned water into it as soon as completed. This ditch was afterwards used by W. D. Story to irrigate the said lands after his settlement there in the spring of 1895; I believe Story built some laterals from this main ditch built by Miner, but do not know whether or not he constructed any ditch other than the one built by Miner.

Answer to Int. 5. As above stated, I do not know of Story's having built a ditch on the lands mentioned, but he first used water through the Miner ditch immediately after he settled on the land in the spring of 1895. The ditch covers all of the land on which Story settled with the exception of perhaps ten or twelve acres, and Story irrigated about 140 acres of the land in raising hay.

Answer to Int. 6. C. H. Young, in the spring of 1898.

242 Answer to Int. 7. The defendant Young has resided on the lands continuously since the time he settled there in 1898.

Answer to Int. 8. He has irrigated about 140 acres of the land and raised garden and crops of hay and grain every year since he has lived on the place.

Answers of Allen P. Graham to Cross-Interrogatories.

Answer to Cross-Int. 1. None of the land was fenced at the time Story settled there in the month of April, 1895, but he immediately fenced the whole 160 acres.

Answer to Cross-Int. 2. Raised no crops of grain at all, but irrigated the entire place for hay; cut hay off of probably fifty or sixty acres each year from 1895 to 1898.

ALLEN P. GRAHAM.

Subscribed and sworn to before me this 3d day of May, 1905.

[L. s.]

HARRY L. WILSON,

Notary Public in and for Yellowstone County, Montana.

243 *Certificate of Notary Public to Depositions of Allen P. Graham et al.*

STATE OF MONTANA,

County of Yellowstone, ss:

I, Harry L. Wilson, a notary public in and for said County and State, do hereby certify:

That on the third day of May, 1905, at my office in the City of Billings in said county, between the hours of nine A. M. and five P. M. of said day, pursuant to the stipulation of counsel hereto attached, the depositions of Allen P. Graham, John Miner and George Teeple were taken before me on the interrogatories and cross-interrogatories hereto attached; that the interrogatories and cross-interrogatories to be propounded to each witness were by me read to said witness and his answers thereto by me reduced to writing, and that after all of such answers were so written, they were, together with the interrogatories, read over to the witness and by him corrected and subscribed and sworn to before me.

That all of the interrogatories, cross-interrogatories and answers of the respective witnesses are contained in the foregoing transcript.

244 In witness whereof, I have hereunto set my hand and affixed my notarial seal this third day of May, 1905.

[L. s.]

HARRY L. WILSON,

Notary Public in and for Yellowstone County, Montana.

[Endorsed:] Title of Court and Cause. Depositions opened by order of Court and filed and entered June 7, 1906. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 7th day of June, A. D. 1905, the stipulation and testimony taken before H. L. Wilson, notary public, was filed herein, as follows, to wit:

245 In the United States Circuit Court, Ninth Circuit, District of Montana.

WILLIAM MORRIS, Plaintiff,

vs.

J. N. BEAN, JOHN SADRING, L. O. DILTZ, ALLEN P. GRAHAM, William Eley, Curtis Beeler, Charles Ingram, W. B. Bainbridge, C. Runyan, William Sholtz, C. E. Steele, Bert Bent, Whose True Name is S. W. Bent; Wallace Bent, John Rhodes, F. Banderhoff, C. S. Erickson, Tillman C. Graham, James Pauley, C. M. Brown, John Bowler, J. A. King, A. Holm, M. Young, Corbett Bennett, and Michael Wrote, Defendants.

Stipulation that Testimony May be Taken by Depositions, etc.

It is hereby stipulated between counsel for the plaintiff and intervenor and counsel for the several defendants that the testimony in this case may be taken by depositions before H. L. Wilson, a notary public, at his office in the city of Billings, county of Yellowstone, State of Montana; or if not practicable for him to take 246 the same, before some other notary public at the same time and place as herein designated.

It is further stipulated that the taking of said depositions shall begin on the 9th day of August, 1904, at the hour of two o'clock P. M., and shall continue from day to day or from time to time upon adjournment until all of said depositions shall be taken.

It is further stipulated that the plaintiff and intervenor shall take their depositions first, or so much thereof as may be convenient and practicable for them to take.

It is further stipulated that the defendants may take their depositions in such order as they may agree upon or as may be practicable and convenient—the purpose of this agreement being to have all the proof taken in the case preparatory for the trial of the same.

It is further stipulated that the depositions shall be taken upon such interrogatories and cross-interrogatories as may then and there be propounded orally to each of said witnesses and said testimony, when so taken, shall then and there be reduced to writing by the said notary and subscribed by each witness and transmitted by mail or express by said notary to the clerk of the Circuit Court of the United States, in the city of Helena, Montana.

247 We hereby waive formal certificate and caption to the several depositions and agree that said depositions may be read as evidence upon the trial by any party who so desires, subject to exception alone for competency.

J. R. GOSS,

McCONNELL & McCONNELL,

Attorneys for Plaintiff and Intervenor.

GEO. W. PIERSON,

Attorney for Def'ts. S. W. Bent, Wallace Bent,

J. N. Bean, Corbett Bennett, and Wm. Bainbridge.

O. F. GODDARD,

Attorney for King, Young, and Wrote.

[Endorsed:] Title of Court and Cause. Stipulation. Filed and entered June 7, 1905. Geo. W. Sproule, Clerk.

248 In the United States Circuit Court, Ninth Circuit, District of Montana.

WILLIAM MORRIS, Plaintiff,

vs.

J. N. BEAN, JOHN SADRING, L. O. DILTZ, ALLEN P. GRAHAM, William Eley, Curtis Beeler, Charles Ingram, W. B. Bainbridge, C. Runyan, William Sholtz, C. E. Steele, Bert Bent, Whose True Name is S. W. Bent; Wallace Bent, John Rhodes, F. Banderhoff, C. S. Erickson, Tillman C. Graham, James Pauley, C. M. Brown, John Bowler, J. A. King, A. Holm, M. Young, Corbett Bennet and Michael Wrote, Defendants.

Deposition of William A. Morris on His Own Behalf.

Be it remembered that the depositions of the following witnesses were taken in the above cause in pursuance of a stipulation entered into by counsel for the plaintiff and intervener, and counsel for certain of the defendants as therein stated, which said stipulation is filed herewith.

249 WILLIAM A. MORRIS, called in his own behalf, being duly sworn, testified as follows:

Q. State your full name and residence.

A. William Alford Morris, Frannie, Big Horn County, Wyoming.

Q. State whether or not you are the plaintiff in the above-entitled cause.

A. Yes, sir.

Q. State whether you are the owner of and in possession of the lands described in paragraph four of your bill of complaint, to wit: The southwest quarter of the southeast quarter, and the east half of the southwest quarter of section thirty, and the northeast quarter of the northwest quarter of section thirty-one, in township fifty-eight north, range ninety-seven west, containing one hundred and sixty acres.

A. Yes, sir.

Q. State when, if at all, you went into possession of said lands.

A. The exact date I can't say, but it was in March '87-1887.

Q. State whether or not you have been in possession of said lands from the time you first went into possession to the present time.

A. I have.

250 Q. State whether you have a patent to those lands.

A. I have.

Q. You will examine this paper, which is the patent to the lands you have described, and state what was the date of it.

(Paper handed to witness and by him examined.)

A. The 12th day of February, 1902.

(Patent exhibited to counsel on the other side and to save unnecessary encumbrance of the record, the introduction of the same is waived.)

Q. State what is the character of the lands described, the one hundred and sixty acres, as to whether it's agricultural lands or otherwise.

A. It is.

Q. What have you got to say as to its being arid and requiring irrigation to make it produce crops?

A. If you ain't got water you can't raise a thing on it; you got to have water or the land is no good.

Q. State whether or not from the date you have fixed, some time in March, 1887, you have been in possession and farming and cultivating this land.

A. I have cultivated it ever since March up to the present date.

Q. March of what year?

A. 1887.

Q. What has been the character of the crops which you have raised?

251 A. Well, my first crop was oats; I have raised over one hundred bushels of oats per acre, and I had wild hay during that time for the first two or three years and then this hay run out and I had to sow alfalfa and I have had alfalfa ever since.

Q. State how much in the way of oats or other agricultural crop you put in the first year after you took possession of this land.

A. The first year I put in eight acres of oats, six acres of corn and probably two or three acres of garden.

Q. State whether that year you irrigated for hay any of the land, and if so, how much.

A. Well, I irrigated for hay about twenty acres, I think, or twenty-five, besides my grain which I had to irrigate, of course, or it wouldn't grow.

Q. Now state what you did in succeeding years after the first year in the way of getting crops and irrigating, and especially whether you increased the number of acres that you brought under the influence of water.

A. Yes, sir, I kept increasing until now, that is four or five years ago, I had about one hundred acres of alfalfa and plow land, grain land, in cultivation.

Q. State whether your ditch covers all of the one hundred and sixty acres or only a portion of it.

A. It does.

252 Q. Well which?

A. It covers all.

Q. How much of the one hundred and sixty acres have you actually irrigated?

A. I have irrigated the whole one hundred and sixty acres for pasture and hay and grain too.

Q. What is the character of the land as to whether it's good land or part good and part not good; describe it?

A. This land of mine is all good.

Q. How is it situated is it broken or level?

A. It's level.

Q. State as to its productiveness, whether it's ordinarily productive, or very productive, or poor.

A. It's very productive.

Q. What amount of alfalfa per acre have you been able to make it produce?

A. When I had plenty of water I could raise about, well I don't know, but about from six to seven ton per acre, that is, the three cuttings.

Q. Now, state whether when you first went into possession of this land you took it up under any claim of the United States land laws; if so, under what did you take it?

A. Took it up as a homestead.

Q. State whether or not you lived on it as a homestead from that time to the present time?

A. I have.

253 Q. Was it surveyed land when you went into possession of it?

A. No, sir.

Q. When was it surveyed?

A. Oh, I cant' tell.

Q. Well, approximately as near as you can; give the year.

A. About '90 or '91, I think it was, I won't be positive.

Q. State whether you ever appropriated any water for use upon that land; if so, state what you did to make the appropriation.

By Mr. GODDARD: For all the answering defendants, in the absence of Mr. Pierson representing a portion of them, we object to this character of testimony, or of any testimony in relation to the water right or the appropriation of water, on the ground that it is incompetent and immaterial, and that this Court has no jurisdiction to determine water appropriations or water rights beyond the limits of this state or the jurisdiction of this Court; and this objection is made to all testimony of the character of the testimony elicited by the question just asked.

A. I appropriated—I didn't know what amount of water it took per acre; I had the papers made out here in Billings by Judge McGinniss. I made a ditch two feet on the bottom, three feet

254 on top, twenty inches deep, and the grade of the land, of course; that's the amount of water I filed on.

Q. Out of what creek did you take this ditch?

A. Sage Creek.

Q. What river, if any, is Sage Creek a tributary to?

A. Shoshone, known as the Shoshone; we call it the Stinking-water.

Q. What, if anything, did you do to divert the water from the creek into the ditch?

A. I put a dam in the creek.

Q. Can you state the grade of that ditch, the fall, per rod; about how much the fall is per rod?

A. I think it must be eighteen or twenty feet to the mile.

Q. State whether the grade is uniform or otherwise?

A. Yes, sir; it is uniform.

Q. Now, do I understand you to say that this ditch which you constructed is so situated that the water conducted through it covers the whole of your one hundred and sixty acres of land?

A. Yes sir.

Q. How far is it from the point of diversion on Sage Creek to where it enters your land, where you use it?

A. Half a mile, one half-mile.

Q. What is the direction that your ditch runs from the point of diversion to the place of use?

255 A. Well, it runs southeast to the head of my land, and then it runs south.

Q. Can you give us the quarter section of land where the ditch taps the creek?

A. No, sir; I can't.

Q. You state in your complaint it's at a point on the northwest quarter of section nineteen, township fifty-eight north of range fifty-seven west, in Big Horn County.

A. Well, it's in another section north of me, but what quarter my dam is in I don't know, and then runs in a southeasterly direction from there until it strikes my place and then runs on south through my place.

Q. State whether or not your land is situate on this Creek, Sage Creek.

A. It is.

Q. Does the creek run through it or by it?

A. The creek runs almost through the center of my land.

Q. In irrigating your land, state whether or not you use the ditch to its full capacity of water.

A. I do when there is plenty of water in the spring, in order to irrigate quick.

Q. Now you may state whether or not it's necessary to use the full capacity of the ditch to irrigate successfully your land to the best advantage.

A. No, sir.

256 Q. What has been your experience in irrigating; how much have you irrigated?

A. I have irrigated for the last sixteen years.

Q. Can you tell how many inches of water it is necessary to use to irrigate this land of yours?

A. Well, I know it will require one hundred and fifty inches of water to irrigate the one hundred and sixty acres.

Q. What is the character of the soil as to whether it is loam or gravel?

A. Well there is some gravel but mostly loam; the gravel requires more water than the loam does.

Q. You think something like an inch to the acre on an average would be sufficient?

A. Yes, sir.

Q. State whether you have any other source of supply of water that you can use to irrigate your land except out of Sage Creek?

A. I have not.

Q. When did you commence to take out the ditch to make the appropriation?

A. In '87, 1887.

Q. What time in the year?

A. I think it was in April. Now, then, I think in '89—this first ditch didn't cover the head of my land, and I took out another ditch that covered all my land.

Q. Did you abandon the use of the first ditch when you took out the second one?

A. Yes, sir.

257 Q. What's the size of your second ditch?

A. Same size as the other one.

Q. Same fall?

A. Yes, sir.

Q. Are you acquainted with these defendants; J. N. Bean, do you know him?

A. Yes, sir.

Q. John Sadring?

A. No, I don't know the man.

Q. L. O. Diltz?

A. Yes, sir.

Q. Allen P. Graham?

A. Yes, sir.

Q. William Eley?

A. Yes, sir.

Q. Curtis Beeler?

A. Yes, sir.

Q. Charles Ingram?

A. I am not personally acquainted with him.

Q. W. R. Bainbridge?

A. Yes, sir.

Q. C. Runyan?

A. Yes, sir.

Q. William Sholtz?

A. No, sir; I am not personally acquainted with him.

Q. C. E. Steele?

A. Yes, sir.

Q. Bert Bent?

A. Yes, sir.

Q. Wallace Bent?

A. Yes, sir.

Q. John Rhodes?

A. Yes, sir.

Q. F. Banderhoff?

A. I know him when I see him.

Q. O. S. Erickson?

A. Yes, sir.

Q. Tillman C. Graham?

A. Yes, sir.

Q. James Pauley?

A. Yes, sir.

258 Q. C. M. Brown?

A. Yes, sir.

Q. John Bowler?

A. Yes, sir.

Q. J. A. King?

A. Yes, sir.

Q. A. Holm?

A. Yes, sir.

Q. C. H. Young?

A. Yes, sir.

Q. Corbett Bennett?

A. Yes, sir.

Q. And Michael Wrote?

A. Yes, sir.

Q. State whether or not at the time you made your appropriation of water in '87 any of these parties, or their predecessors in interest, had made any appropriation from the same creek in the State of Montana?

A. They had not.

Q. Now, you may state whether or not any of these defendants that you have named that you are acquainted with, have used any of this water when you needed it, and, if so, whether you went to see them, and what took place and what they said.

A. I did.

Q. Fix the time.

A. I can't do that exactly; I went to see Mr. Bent somewhere in July, two years ago, that would be in 1902; Mr. Bent said that he wouldn't let me have any water.

Q. Which Bent now?

A. Wallace Bent.

Q. State whether he was using it at the time or not.

A. He had his ditch full of water; told me that he didn't have any garden, for he was short of water.

259 Q. Well, now, did you see anybody else at that time?

A. No, sir.

Q. Well, before that, did you see any of these people?

A. No, sir.

Q. Do you know whether they were using water at the time you were short of water?

A. Yes, sir; I know that.

Q. Did you send anyone to them to make demand on them to turn the water down to you?

A. No, sir; I was waiting on my lawyer to bring this thing to trial, and he wouldn't do it.

Q. But before you brought this suit, state whether you had any trouble about water or not.

A. Well, I was short of water, but I didn't make any complaint about it.

Q. Did you see J. N. Bean about water?

A. Yes, sir.

Q. When did you see him?

A. About '98, I think it was.

Q. What did he say to you?

A. Mr. Bean told me that he was going to irrigate that afternoon, and he would turn the water down, and he turned the water down the creek, and it run about a half a day; then the water was shut off again.

Q. Do you know who shut it off?

A. No, sir.

260 Q. Did you see anybody else besides Wallace Bent and J. N. Bean?

A. I didn't speak to anybody else, because they was the two principal ones.

Q. The two principal ones on the creek?

A. Yes, sir.

Q. You mean the two principal users of water?

A. Yes, sir.

Q. State whether or not at any other times you made demand on them for water, and if so, what did they do or say?

A. Not that I remember of.

Q. Now, how many years have you been short of water?

A. Five or six years.

Q. Now, what has been the extent of the shortage?

A. I haven't had more than half enough water.

Q. What crops were you trying to cultivate those years?

A. Alfalfa.

Q. Now, you have said before that you raised three crops a year?

A. Yes, sir.

Q. Now, state what you were able to do with the water you had the years you say you were short?

A. I could raise one good crop, and the second crop would be about half a crop.

Q. How about the third?

A. I wouldn't get none.

Q. State, then, about what was the average of your crop altogether?

261 A. That is, you mean in value.

Q. No, what portion, whether a half, or a third, or what?

A. It would be at least a third or a half a crop in all.

Q. A half a crop?

A. Yes, sir.

Q. What was alfalfa worth those years in the stack?

A. Five dollars per ton.

Q. How many acres did you cultivate during those years in alfalfa?

A. I had about from seventy to eighty acres, I think, in alfalfa.

Q. Your crop was cut short about one half?

A. Yes, sir; I had twenty-five acres in timothy.

Q. What injury, if any, did the timothy suffer for want of water?

A. It dried out entirely.

Q. How many years were there that you got no crop of timothy by reason of shortage of water?

A. Four years.

Q. State whether or not prior to these defendants making their appropriations in Montana out of this creek, you had any shortage of water?

A. Before they settled?

Q. Yes, before they settled there.

A. No, sir; I couldn't say how many inches went past that I didn't use at all, that went to waste, you might say.

262 Q. Always had an abundance of water?

A. Oh, yes; plenty.

Q. And a surplus?

A. Yes, sir.

Q. You say you commenced taking out the ditch through which you have used the water in April, 1887; when did you complete it and get water through it?

A. The same year.

Q. In '87?

A. Yes, sir.

Q. State whether the paper which I hand you is the statement of water claim made by you in the State of Wyoming?

A. Yes, sir.

Q. You will please make an exhibit of it, mark it Exhibit "A," and make it a part of your deposition.

By Mr. GODDARD: The answering defendants object to the introduction of the exhibit for the reason that it's incompetent and immaterial and does not comply with either the laws of the State of Wyoming or the State of Montana.

(Statement marked "Plaintiff's Exhibit 'A' to Deposition of William A. Morris.")

Q. In this statement of claim to water right marked Exhibit "A," to your deposition, it places the location of the water right in Johnson County, State of Wyoming; please explain that.

A. There was a great many at that time which filed in 263 Johnson County, and they told me it was in Johnson County;

I think it was in Johnson County at that time.

Q. Fremont County has been cut off since?

A. Yes, and then Big Horn is since that.

Q. During the years you have been short of water, the last five or six years, state what has been your average damage, according to your best judgment.

By Mr. GODDARD: That is objected to by all the answering defendants for the reason that it's incompetent and it's immaterial. The witness cannot be allowed to state his opinion as to the damage, and it would not be competent for him to state his damage unless it is shown that the damage is caused by the defendants or some of them.

A. About a thousand dollars per year.

Q. Now, state what was the cause of the shortage of water during the years you have mentioned.

A. It has been used by parties in Montana that are on the creek on Sage Creek, in Montana.

Q. Now state whether or not such parties are the defendants in this case, or some of them; if not all of them, state which ones are.

A. Well, it's all of them, more or less, but then I couldn't go over there and see who was using the water all the time, but they all had crops.

Q. Did you see the crops?

A. Yes, sir.

264 Q. Could they raise the crops in Montana without water?

A. No, sir.

Q. What was the extent of acreage cultivated by all of these people in Montana during those years you were short of water?

A. Do you want an average? That's the only way I could answer it.

Q. Yes, the average acreage.

A. I would say, on an average, fifty acres or sixty acres.

Q. All of them?

A. Yes, sir.

Q. Hay and all?

A. Well, no; not hay.

Q. Give the whole of it.

A. Seventy-five acres.

Q. How far from your point of use on your place was it to where those people used this water?

A. From eight to twenty miles; that is, eight was the nearest; twenty miles was the farthest.

Q. Now, what was this timothy, that you say was destroyed for the want of water, worth?

A. Timothy hay was worth, I guess, seven dollars or seven and a half a ton.

Q. How many tons would that twenty acres yield?

A. I guess about forty ton.

Q. Two tons to the acre?

A. Yes.

Q. And ran about seven dollars a ton?

A. Yes.

265 Q. And how many years did you lose that?

A. Lost that four years.

Q. Has that been destroyed, the roots and all died out?

A. Yes, sir.

Q. What would it cost to re-seed in timothy the same ground?

By Mr. GODDARD: That is objected to as immaterial.

A. Fifty dollars.

Q. You spoke of the defendants cultivating seventy-five acres of land; explain what you meant by that.

A. Seventy-five acres apiece; I asked you if it was an average; I meant on an average of seventy-five acres apiece.

Cross-examination.

(By Mr. GODDARD, Attorney for the defendants, King, Allen P. Graham, Wrote, Eley, and Young:)

Q. This water right of yours that you have introduced here is the only notice of water right that you ever filed for the appropriation of water for these lands, is it?

A. Yes, sir.

Q. And that is the only right or authority under which you claim waters for irrigation of your lands from Sage Creek?

266 By Mr. McCONNELL: Counsel for the plaintiff objects on the ground that it is calling for a legal opinion of the witness; he has stated the facts which constitute his appropriation and use of water and they speak for themselves without his opinion about it.

A. Yes, sir.

Q. Did you ever at any time abandon this ditch, this last ditch that you built, or cease to use it any year?

A. The last ditch I built.

Q. Yes.

A. No, sir.

Q. You have said that you had plenty of water to irrigate your lands prior to the time these defendants or their predecessors settled on Sage Creek. Now, I will ask you if you had water prior to their settling there every year, all you required during the entire irrigation season?

A. Yes, sir, I had.

Q. Did you have plenty of water in the fall of '87 to irrigate?

A. Yes, sir.

Q. And what about '88?

A. Plenty of water.

Q. Do you know when the defendants settled on Sage Creek?

A. I think it was '93; I won't be positive.

267 Q. Now, you have said that for five years prior to the commencement of this action you were short of water?

A. Yes, sir, I think I was.

Q. What years were those that you were short of water?

A. I have been short of water for the last eight or nine years; I haven't had enough. That would make it about '95; I can't tell you the exact dates of these things, but then I know I have been short of water ever since, before this thing commenced, but as to giving you the dates I can't do it.

Q. Well, what was the first year you were short of water?

A. I think it was '94.

Q. That's the first year you were short?

Q. Well, what was the first year you were short of water?

Q. Well, when was the first time you notified any of the defendants that you were short of water?

A. About '96 I think it was; I went to Bean first; I won't be positive now on those dates.

Q. How far up the creek does he live from you?

A. He lives about ten miles on a tributary to Sage Creek.

Q. On Piney?

A. Piney.

Q. When did you notify Wallace Bent that you were short?

A. 1902.

Q. And these are the only defendants you have ever notified?

268 A. Yes, sir, I have talked with several of them that I was short of water every year but I wouldn't ask them for water.

Q. Now, you have said that the defendants cultivated on an average of seventy-five acres of land each year?

A. Yes, sir, each man on an average.

Q. That would be seventy-five acres per man?

A. Yes, sir.

Q. Do you mean all of these defendants named in the bill?

A. Yes, sir.

Q. Well, for how many years have they been cultivating that amount of land to each man?

A. Some of these—I want this understood thoroughly—come in afterwards and took up ranches and went to irrigating, and the next year somebody else would come in and take up a ranch and so on, but on an average they have cultivated and irrigated about seventy-five acres per man, for how many years I couldn't say.

Q. Well, we will take Mr. King for instance: When did he settle there?

A. Mr. King settled there, I think just as soon as that reservation was thrown open, the same year that was thrown open.

Q. That would be 1892.

A. I think so.

269 Q. And to what extent has he used water out of Sage Creek?

A. Well, Mr. King has about fifty acres, I judge, or maybe more, of hay land and all, I don't know, that he has irrigated.

Q. Do you know whether he has irrigated every year since he has been there?

A. I notice his place always looks green, but whether he irrigated or not—

Q. You don't know?

A. I don't know, but he couldn't have raised anything without it.

Q. He lives on Piney?

A. No, sir, he lives between Piney and Sage Creek.

Q. Well, he would get his water from Piney?

A. He would get his water from Piney, yes.

Q. You don't know, or pretend to know, to what extent these defendants, or any of them, have diverted the waters from Sage Creek during all of these years from 1892?

A. Diverted it to the extent that I never had half enough water to irrigate my place, and for the last four years I have been dried out there; I couldn't have any water for my stock and had to drive them a mile, and further, a mile and a quarter, to a little seep there was in the creek, my cows and my horses.

270 Q. You don't know which one of the defendants were using the water?

A. They all had ditches and all of their farms looked green, and they couldn't look green if they didn't have water to make them look that way.

Q. But you don't know whether they were using that water of your own knowledge?

A. No, sir, only some of them; some of them I don't know about.

Q. Which of the defendants diverted the water?

A. Why Wallace Bent, Bert Bent, Allen P. Graham, J. A. King, and Bean, William Bainbridge, C. Young, John P. Graham, and Erickson, Pauley, most all of them.

Q. Now are you stating that of your own knowledge, that all of those defendants diverted the water there and used it?

A. Yes, sir; I never seen the water running but they couldn't raise anything if the water didn't run; I have seen their farms off in the distance and you can't raise nothing in that country without you have got water.

Q. You never made any demand of any of these men that you have mentioned except Bean and Wallace Bent?

A. That's all; they claimed to be the chief moguls and I went to headquarters.

271 Q. This land that you claim this water for is in the State of Wyoming?

A. Yes, sir.

Q. Sage Creek rises in the State of Montana, does it not?

A. Part of it—all of it I guess does.

Q. All of these waters of Sage Creek rise in Montana, don't they?

A. Yes.

Q. And flow in a southerly direction into the State of Wyoming and into Stinkingwater River?

A. Yes, sir.

Q. And all of the defendants reside in Montana?

A. Yes, sir.

Q. Do you know whether anyone else excepting the defendants has been using water from Sage Creek during the last four or five years?

A. You mean in Wyoming, I suppose.

Q. No, I mean Montana.

A. I think there is one I know of.

Q. How late do you irrigate your alfalfa lands each year?

A. I had to irrigate whenever I could get the water. If it was September I would irrigate it, if it was October I would irrigate it, and if it was November I would irrigate it.

Q. When would you usually cut your last crop of alfalfa?

272 A. In September, about the 20th of September.

Q. Did you irrigate between the cutting of the crops?

A. When I raised three crops, yes, sir.

Q. And you irrigated after you got the last crop off?

A. No, sir, not after I got the last crop off; I would irrigate before I cut the last crop and I wouldn't irrigate any more.

Q. Now you have raised crops of native hay there haven't you?

A. Yes, sir.

Q. All these years up to date?

A. Very little the last eight or ten years, very little wild hay, not to amount to anything at all.

Q. And you say that you have irrigated the whole one hundred and sixty acres?

A. Yes, sir; part of it's pasture.

Q. Well, how is it divided so far as the crops are concerned, how much of each crop have you got there?

A. I have got twenty acres of timothy and about seventy acres of alfalfa, and the rest in pasture.

Q. Any wild hay lands?

A. Yes, but the wild hay didn't amount to anything what I got off of it.

Q. Do you recollect about the water being short there in '87?

A. With me?

273 Q. Yes, there in the creek?

A. There never was any shortage with me before the reservation was throwed open in '92, no shortage with me; always had plenty of water, plenty of it, went to waste down past in the creek.

Q. This water sinks below the last settler above you does it not before it reaches your place?

A. No, sir.

Q. It don't?

A. No, sir; it sunk this season but we put a dam across and stopped it.

Q. Who put the dam across?

A. Adams.

Q. Is he a party to this suit?

A. No, sir.

Q. Where did he put the dam across?

A. About a mile and a half below Beeler.

Q. You say the nearest settler to you above you is eight miles about?

A. The nearest settler is about seven miles.

Q. Who is that?

A. Adams.

Q. And who is the next settler?

A. Runyan.

Q. Is he a party to this suit?

A. Yes, sir.

Q. When did Runyan settle there?

A. Allen Graham had that ranch first and I don't know when he settled there; Runyan was there in 1901 when they was grading the railroad.

Q. When did Adams settle there?

274 A. Adams settled there I think at the same time Runyan did.

Q. 1901?

A. I think so.

Q. And was he using the water that year?

A. Adams?

Q. Yes.

A. No, sir, Adams hasn't used any water until this year.

Q. Do you know how much water Sage Creek runs in the dry season of the year up above the mouth of Piney?

A. No, sir; I know it don't run very much because they are using it all; above the mouth of Piney at what point?

Q. Well, anywhere, provided the settlers take none out.

A. I always supposed the creek run about five hundred inches at low tide.

Q. Five hundred inches?

A. Yes, sir.

Q. About how many inches run down below your place at low tide?

A. The same stream came down, I couldn't see any difference at all.

Q. That was before they settled up there?

A. Yes.

Q. You must have had a large surplus then?

275 A. I had more water than I could begin to use at all.

Q. Did you use one hundred and sixty inches of water then?

A. Yes, sir, used it every year.

Q. You have had no difficulty in getting water at all in the spring of the year have you?

A. No, sir, not in the first irrigation.

Q. Water plenty for irrigating then?

A. Yes, sir.

Q. Where did this second ditch tap the creek?

A. This second ditch tapped the creek about three hundred yards above the other ditch, three or four hundred yards, about four hundred yards I guess.

Q. You took that out in 1889?

A. I think it was, yes, 1888 or '89. I took that out because after my land was surveyed my other ditch wouldn't cover the land.

Redirect examination.

(By Mr. McCONNELL:)

Q. You spoke of the only right or authority under which you make claim to this water being the statement of claim that you have exhibited here; state whether or not you mean that's the only paper title which you have?

A. Yes, sir.

Q. State what would be the cost of harvesting this alfalfa, cultivating it and harvesting it?

276 By Mr. GODDARD: We object to that as immaterial.

A. Cultivating and harvesting it would cost about, well now I

could make a close estimate of it, about three dollars per acre I think, that is, to cultivate and irrigate it and everything, harvest it and stack it.

PLAINTIFF'S EXHIBIT "A."

In the District Court, Second Judicial District, in and for Johnson County, Wyoming Territory.

Statement of Claim to Water Right.

Under Chapter 61, Session Laws of 1886, Irrigation, "An act to Regulate the use of Water for Irrigation and for other purposes, and providing for Priority of Rights Thereto."

By William A. Morris, of the County of Johnson, Territory of Wyoming, Owner of the Sage Creek Water Right.

TERRITORY OF MONTANA,
County of Yellowstone, ss:

William A. Morris, being first duly sworn, according to law, do depose and say that he is a resident of and is located in Johnson County, Wyoming Territory, and he makes this statement of claim to Water Right for the purpose of securing the right to the water of Sage Creek in the said County and Territory heretofore appropriated by him, and for said purpose I do depose and say:
277 The name of said claimant for which said appropriation is claimed is William A. Morris. The name of the owner of said ditch is William A. Morris. The postoffice address of the owner of said ditch Billings, Montana. The headgate of said ditch and water right is located on Sage Creek in Johnson County, Wyoming, about one mile down said Creek from where said Creek crosses the Wyoming and Montana mine. The general course of said ditch is from about northwest to southeast. The name of its natural stream from which the said ditch draws its supply of water is Sage Creek, a tributary of Stinkwater River, Wyoming. The length of said ditch is three miles. The width of said ditch is (3½) three and ½ feet. The depth of said ditch is two and ½ feet. The grade of said ditch is 50 feet per mile. The water of said stream was appropriated by William A. Morris, aforesaid, by means of a dam in said creek and ditch therefrom for said William A. Morris by the original construction thereof on the 5th day of May, A. D. 1887.

The amount of water claimed for said ditch is — cubic feet per second of time.

The present capacity of said ditch is — cubic feet per second of time.

278 The number of acres of land under said ditch and being and proposed to be irrigated therefrom is six hundred and forty acres, more or less.

W. A. MORRIS.

Subscribed and sworn to in my presence this 25th day of June,
A. D. 1887.

[NOTARIAL SEAL.]

JOHN MCGINNESS,
Notary Public.

[Endorsed:] Wm. A. Morris. No. 2804. Office of Register of
Deeds. County of Johnson.

I hereby certify that the within instrument was filed in this office
for record on the 2 day of July, A. D. 1887, at 5 o'clock P. M. and
was duly recorded in Book "D," Misc. Rec., page 405. W. A. Ev-
ans, Register of Deeds. ——— Deputy. 28-04, Fees p'd. 53.
No. 666. Morris. Plaintiff's Exhibit "A" to be Attached to the
Deposition of Wm. A. Morris. Filed Aug. 10, 1905. Geo. W.
Sproule, Clerk.

Deposition of T. N. Howell.

The witness T. N. HOWELL, being first duly sworn, testified as
follows:

Q. Mr. Howell, where do you reside at the present time?

A. I am living here in Billings now.

Q. Where did you formerly live?

279 A. Out in that country, the Stinkingwater country, Free-
mont County.

Q. Wyoming?

A. Wyoming; it was Freemont county when I went there; its Big
Horn county now.

Q. State whether you are the T. N. Howell who is the intervener
in this case.

A. Yes, sir.

Q. State whether you are a citizen of the United States.

A. Yes, sir.

Q. Native born?

A. Yes, sir.

Q. Are you acquainted with the defendants in this lawsuit?

A. Most of them.

Q. State whether or not you are the owner of and in possession
of the lands described in paragraph four of your complaint in inter-
vention, and described as follows: The west half of the northeast
quarter, and the southeast quarter of the northeast quarter, and the
north half of the southeast quarter, of section twenty-nine, township
fifty-seven north, range ninety-seven west, containing two hundred
acres of land?

A. Yes, sir.

Q. How long have you been in possession of this land?

A. Thirteen years.

Q. State whether you are the owner of a water right appurtenant
to these lands?

A. Yes, sir.

- Q. State what you did to acquire that water right.
- 280 A. I took out a ditch and appropriated the water, put the water on the land and raised a crop.
- Q. What time did you begin to construct that ditch?
- A. 1890.
- Q. What month and what time in the month?
- A. In August, I made the ditch in August.
- Q. What's the size of that ditch?
- A. About five feet on the bottom, six feet on top.
- Q. And the grade?
- A. A quarter of an inch to the rod.
- Q. State whether it's uniform or otherwise.
- A. Yes, sir, it's uniform, surveyed with an instrument.
- Q. Now, what did you do, what appliances did you use, to get the water out of the creek into the ditch?
- A. Put in a dam, put a dam in Sage Creek.
- Q. How far from these lands described is the point of diversion from Sage Creek of this water?
- A. I measured the ditch once; it was a mile and a half long, the ditch, following the meanderings of the ditch; the ditch is a mile and a half long from the headgate to my land.
- Q. State whether this ditch covers all these lands or not so they can all be irrigated.
- 281 A. My ditch now covers about one hundred and sixty acres—well its always covered that—I could cover more but that's all the ditch covers now.
- Q. State what irrigation you have done upon this land through the water appropriated through this ditch.
- A. I have had all the land in grain and alfalfa and timothy, every bit in.
- Q. What was the first year that you cultivated it?
- A. In '91, I didn't have a crop but I sowed alfalfa the first year.
- Q. How much alfalfa?
- A. About forty acres.
- Q. Did you increase that from year to year, that acreage?
- A. After that, yes, I sowed seventy acres at another time.
- Q. Did you raise anything besides hay?
- A. Yes, sir, I raised some good crops of grain.
- Q. What character of grain?
- A. Oats and wheat.
- Q. State as to the productiveness of your land, whether it was productive or not.
- A. Believe it was the best land I ever cultivated.
- Q. What have you to say as to the necessity for the use of water to make it produce?
- 282 A. It wouldn't be worth a cent without water.
- Q. What is your land worth?
- By Mr. GODDARD: We object to that as immaterial.
- A. About twenty-five dollars an acre.
- Q. Now, what is the water worth?
- By Mr. GODDARD: We object to that as incompetent.

A. About the same; the land wouldn't be worth anything without the water.

Q. I will ask you what you have to say as to Mr. Morris' land and water right.

A. I think his is about the same.

Q. About the same?

A. Yes, just about the same.

Q. Examine that paper and see if it is the receiver's receipt for a title or patent to those lands?

(Witness examines.)

A. Yes, sir.

(Receiver's receipt, bearing date February 8th, 1903, for a patent to the lands described in the plaintiff's petition, exhibited to counsel and here offered as Exhibit "A" to the deposition of the witness, the same having been identified by him as said receiver's receipt.)

283 By Mr. GODDARD: To which *the* answering defendants object on the ground that it's incompetent and immaterial for any purpose in this case.

Q. When did you go into possession of these lands?

A. '91.

Q. You say you took out the water in 1890?

A. I took out the ditch in 1890.

Q. I will ask you this: Whether you went into possession of it at the time you took out the ditch or not?

A. Yes, sir, I fenced it and fixed my ditch and the next spring put out a crop.

Q. State whether you have been in possession ever since that time up to the present time.

A. Yes, sir.

Q. State whether you have cultivated it each year or not.

A. I cultivated it in '91 and '92, raised a splendid crop; '93 I raised a splendid crop; in '94 I put in a big crop, in fact nearly all of it was in, but I didn't get the water, they took my water and dried it up, they took my water in June and dried the crop up; in '95 I put in a crop and they dried that up, didn't raise anything; in '96 I put in another crop and had a good crop—that is it would have been a good crop, but it was dried up, that is I had a big
284 crop in, seventy acres of alfalfa, about sixty acres of oats and wheat, but it was cut short.

Q. Now, subsequent years to '97, how have you been?

A. Never put in any crop then; I had lost three crops and I got disgusted with it; it was no use to try it until I got the water right.

Q. The last year that you put in a crop, state how much you sowed in alfalfa.

A. Sowed seventy acres in alfalfa that year.

Q. That was in '96, was it?

A. Yes.

Q. Now, state what amount of alfalfa you could raise there per acre when you had water, and did raise when you had water.

A. Well, I sowed forty acres in '91 but didn't get a good stand;

where there was a good stand it would yield about two tons to the acre, but part of it was a very poor stand.

Q. That was in '91?

A. Yes.

Q. Now, how about subsequent years?

A. I had it until '94 and then dried up.

Q. But I am asking you as to the amount of alfalfa you raised per acre when you had water.

A. Cut about two tons to the acre.

Q. You mean two tons to the acre in all?

A. Yes.

Q. Or in one cutting?

285 A. Oh, about four altogether.

Q. Two tons or four tons to the acre in the aggregate then?

A. Four.

Q. Now what was hay worth there of that character, the price in the stack?

By Mr. GODDARD: We object to that as incompetent and immaterial.

A. Five dollars a ton, just about what it sells for all the time.

Q. Now, what years have you missed a crop altogether because of the want of water?

A. '94 was the first crop I lost, and I have lost every one since that, have had no water since.

Q. How many acres did you say you had in alfalfa?

A. I sowed about one hundred and ten acres altogether in alfalfa, but they dried it up; in '96 I sowed seventy acres, it came up nicely but I didn't get any water after June at all and it all died.

Q. State what it would cost to sow, cultivate and harvest ready for market your alfalfa per acre.

By Mr. GODDARD: We object to that as immaterial.

A. I can run one hundred and sixty acres on six hundred dollars put it in the stack.

Q. How much could you put up seventy acres for?

286 A. Well, not much less, because you have got to have about so many hands; I had to have two men on my place there and they cost me one hundred dollars a month, to feed them and all, for six months.

Q. Six months?

A. Yes, but they could handle the whole one hundred and sixty acres.

Q. Did you raise other crops besides alfalfa?

A. I raised good crops of grain two years.

Q. Did you try to afterwards and fail?

A. Yes, sir.

Q. When you had a good crop, what was the net value of your crop after paying all your expenses, what did you make if anything?

A. I made about fifty dollars an acre.

Q. Could you give me the net value of your crops after paying all expenses?

A. No, because I used it feeding.

Q. Feeding what?

A. Feeding sheep and stock.

Q. I am trying to get at the net injury or damage that you sustained by reason of the loss of this water; if you can help me out I wish you would do so.

A. Well, I figured my damage, if I had had water I could have raised six hundred tons of alfalfa hay a year at an expense
287 of six hundred dollars, that's just what I could have done easy, at an expense of six hundred dollars.

Q. That would have been worth five dollars a ton?

A. Five dollars a ton all the time.

Q. Your alfalfa would have netted you then twenty-four hundred dollars?

A. Yes, it would net about twenty-four hundred dollars a year.

Q. Now, what did you lose by means of the loss of your grain crops?

A. Well, I would figure that just the same way.

Q. Well, but how much would you raise, how many acres did you put in wheat and oats?

A. I put nearly the whole of the one hundred and sixty acres in there for two years.

Q. What years were those?

A. '94, '95, and '96, three years there was big crops put in, nearly the whole land.

Q. What did you get those years?

A. Didn't get anything.

Q. Lost it all?

A. Yes, sir.

Q. If you had had water, what would you have raised?

A. I would have raised big crops.

Q. How many bushels per acre?

By Mr. GODDARD: We object to that as incompetent.

288 Q. State what number of bushels per acre you did raise when you raised a crop those two years?

A. I raised seventy bushels of oats per acre.

Q. And how many of wheat?

A. About forty bushels.

Q. Now, what would be the market value of such crops?

By Mr. GODDARD: We object to that as incompetent.

A. Well, I figured it about the same as the alfalfa; I didn't lose less than twenty-five hundred dollars any year of them three years.

Q. And up to the present time?

A. Since that I haven't put it in.

Q. But you could have raised just as much?

A. Oh, certainly, but I had no water at all.

Q. Now, state whether you went to any of those defendants, and if so whom, and made any demand of them to let that water come down?

A. Yes, sir.

Q. Who do you go to?

A. I and Jack Morris both went up in '95, that was the first year I went up, I went to all of them but I didn't see all of them but saw what crops they had in and I talked with quite a number of them and asked them for water, and I remember very well what Bean said.

Q. What did he say?

289 A. He says, "By God, you don't get any water, you ain't going to get any water, I want you to understand that." Mr. Pauley, when I spoke to him, he says, "I will let you have the water this time, but, by God, you will never get it after this year," but I didn't get it.

Q. He kept his word though about not letting you have afterwards?

A. He kept his word about that, yes, but I didn't get it that year either. Well, I talked to a number of them; Mr. Bowler talked pretty rough.

Q. What did he say?

A. Oh, he was going to use the water as long as it come down the creek.

Q. Well, subsequent years state whether or not you were in the country to see, and saw whether they were using the water or not?

A. Yes, sir, went on purpose.

Q. Who was using it?

A. It's hard for me to remember all the names, but if I had a list I could tell you. (Witness refers to title of case for names of defendants.) I was at John Sadring's ranch but I didn't see John Sadring then, I saw him afterwards and talked with him. L. Diltz, I don't know him. Allen P. Graham; Morris and I was together and we was at Graham's but we didn't see Graham.

290 but his crop was being irrigated while we was there. William Ealy, I am not acquainted with him. Curtis Beeler, he has come in there since, I am not acquainted with Beeler. Charles Ingram, I didn't see him. Bainbridge, I didn't talk to Bainbridge but passed right along his ranch; he was not irrigating the day we was there but everything was wet, he had been using water. I want to say here they all can't use water at once; after June they have to a certain number of them use water, they can't all use water at the same time; part of them use water for a day or two and then others use water, that's the way I found it. Some days I would see water in some ditches and other days it would be in other ditches. Runyan, I don't know him. Sholtz, I don't know him. I know all these ranches there but I don't know the parties. I know where Steele is and know all about him but wouldn't know him if I met him in the street. Bert Bent, we was at his place, and Wallace Bent, we was at both their ranches together; they take water through the same ditch, at least it seemed so; there was always

water running in their ditch, at least it seemed so. I went there in '95 and '96 to see who was using water, rode all day, and there was water running in their ditch but none running below the dam; all the water that was in the creek there was running in Bent's ditch but none in the creek. Banderhoff, I saw him but
291 he didn't say much about it, he hadn't been there long when we was there; he was using water though. Erickson, there was considerable water running there at Erickson's. Tillman Graham, at the time we was there, I don't believe there was any water on his place. James Pauley was using water; he was the one that said I never should have any more after that season. Brown, I never had anything to say to him. John Bowler, I talked to him; there was a good deal of water running in his ditch each time I was up there. There was no water running in the ditch at Mr. King's place that day, but the ditch was wet, they had been using water, but that day Mr. Bean was using all the water the day we was there, he was irrigating about forty acres of bunch grass, all his grain and alfalfa was being irrigated and still he was plowing furrows and the water was running out, and he said he intended to do it, he was going to use the water so we wouldn't get any. Mr. King, I didn't talk with him, but there was no water in his ditch when we was there, but his crop was all irrigated, everything was fresh. A. Holm, I don't think I ever saw him irrigating at all. C. H. Young, we passed his place but didn't see him, but it looked like he had about twenty acres of meadow he was irrigating; it was
292 all wet and in good shape. Corbett Bennett wasn't using water either the day we was there, but his meadow had been well irrigated; there was a little water in his ditch but not running; it was shut off, but he does use water. Michael Wrote does use water, but I believe he uses less water than any man on the creek, I think he has less ground than any man on the creek.

Q. Now, then, you say some of them would use the water one day and then the others take it?

A. Yes.

Q. They were acting in concert then among themselves?

A. Yes, it seemed so; part of the time some would be using it and other days others would be using it.

Q. How did they act with reference to you and Morris, whether they took you into the arrangement or not?

A. They didn't act like they would let us have any water.

Q. Well, did they let it come down?

A. No, and they didn't agree to either, never agreed to.

Q. Now, how many inches will this ditch of yours carry?

A. Oh, it would carry four or five hundred inches of water.

Q. What is the depth of it?

293 A. Oh, about fourteen or fifteen inches, sixteen inches.

Q. Sixteen inches deep?

A. Yes, sir.

Q. Five feet at the bottom and six at the top?

A. Yes, sir.

Q. And a fall of a quarter of an inch to the rod?

A. A quarter of an inch to the rod.

Q. How much have you irrigated, what experience have you had?

A. I have been using water for the last sixteen years irrigating.

Q. And the capacity of your ditch is how much?

A. Carry four or five hundred inches of water, but I never used that much.

Q. How much does it take to irrigate your place in the irrigating season?

A. Two hundred inches, I have used two hundred inches and that's about right.

Q. You state in your complaint here that this dam and ditch tapped and diverted the water of Sage Creek at a point on the southwest quarter of the southwest quarter, township fifty-seven north of range ninety-seven west, in Big Horn County, State of Wyoming?

A. When I surveyed the ditch, surveyed the head of it, that is what it was then, but it was close to a correction line, and
294 after I surveyed that, the Government surveyors come there and changed the corners, and I couldn't tell now just what it was, but I was right at that time, but it's changed about a mile, which way I am not sure; its right close to a correction line and the Government surveyors changed the corners.

Q. This ditch was taken out of Sage Creek?

A. Yes, sir.

Q. What was its general course over to your place?

A. South.

Q. What's the length of it?

A. A mile and a half to the land.

Q. Where does the water of Sage Creek take its rise?

A. In Montana.

Q. What county?

A. Carbon County now.

Q. What direction does it flow?

A. It flows west for a long ways and then turns south.

Q. Does it cross the Montana line into Wyoming?

A. Yes, sir.

Q. And what is the distance from its head to where it enters the State of Wyoming?

A. Well, I think about forty miles around the way the creek runs.

Q. But the way the crow flies how would it be, on a direct line?

295 A. Not over twenty miles, eighteen or twenty miles.

Q. I will ask you to state if that is your statement of claim of water right.

(Paper handed to witness and by him examined.)

A. Yes, sir.

By Mr. McCONNELL: I offer this as Exhibit "B" to the deposition of Mr. Howell.

By Mr. GODDARD: To which the defendants object on the ground that it's incompetent and immaterial.

(Paper marked Exhibit "B" to the deposition of T. N. Howell.)

Cross-examination.

(By Mr. GODDARD:)

Q. You say you went on this land in 1890?

A. 1890 I made the ditch and commenced fencing and improving the place, in '90, didn't use any water that year.

Q. When were the lands surveyed by the Government?

A. I don't remember what year now they were surveyed.

Q. Well, how did you enter the lands in the first place, that is, under what Act of Congress did you enter the lands in the first place?

296 A. I made and filed a timber culture on them; some way my filing laid in the office until the Act was repealed, they held it up for a year or so.

Q. Well, what year was that that you filed a timber culture entry?

A. I guess, I think it was in the spring of '91.

Q. When was that Act repealed?

A. I don't know, it was a year or so afterwards; I know my filings was never put on record and when I found it out I put a desert on it.

Q. Put a desert filing on it?

A. Yes, sir.

Q. Did you ever make final proof under the desert law?

A. Yes, sir.

Q. On this land?

A. Yes, sir, made final proof; didn't you see my certificate there?

Q. When did you make the final proof?

A. Last February a year ago; I think it was in February.

Q. The time you got this receipt?

A. Yes, sir.

Q. Now, you commenced an action against some of these defendants in this Court some years ago, didn't you?

A. Yes, sir.

Q. And got a decree?

A. Yes, sir.

297 Q. Do you know whether that decree has ever been annulled or set aside?

A. Lawyers told me that the action of the Court of Appeals set my right aside, that I had got to commence a new suit; two or three lawyers told me that.

Q. Then you commenced a new suit, didn't you?

A. Yes, sir.

Q. Before you intervened in this suit, against some of these defendants?

A. I am afraid I don't understand you.

Q. You commenced another suit after the Court of Appeals decided that your first decree was invalid?

A. No, not until this suit.

Q. Didn't you?

A. No, sir.

Q. Do you recollect of a big freshet in '96 over in that country and that it flooded your place?

A. We had two big freshets there; one of them did break my dam and run lots of water on my place.

Q. What time in the year was that?

A. I think it was in June.

Q. What year?

A. '96.

Q. Well, that gave you all the water you wanted then, didn't it?

A. Yes, sir, but then after the 15th of June I needed water and I didn't have it.

298 Q. Well, did anybody else ever interfere with your water there besides these defendants?

A. No, sir.

Q. Do you know a man by the name of Josiah Cook who had a ranch down the Stinkingwater?

A. Yes, sir.

Q. Did he ever take your dam out?

A. I understood that he tore it out twice.

Q. And didn't he use the water down there?

A. No, sir.

Q. He didn't?

A. No, sir, I had men there when he tore it out.

Q. They put it in?

A. They was right there, yes, and put it in; they put it in twice. He was on Stinkingwater and the mouth of Sage Creek runs through his field.

Q. Does the creek ever run dry above your place at any season of the year?

A. Why, since 1894, it's been dry every year.

Q. You haven't had any water since '94 to irrigate?

A. Not after the 15th of June.

Q. You have plenty up to that time?

A. Up to the first of June, but by the 15th I am out of water; it looks like it just ceases to come out at that time of the year; I am out of water, entirely out of water, the creek dries up, don't have any water for stock.

299 Q. Does the water go down as far as Morris' place?

A. It does later. Morris' place is five miles above mine.

Q. Did you ever have any difficulty in getting water before '92?

A. No.

Q. Before '94?

A. Oh, none.

Q. Had none?

A. Had plenty of water; water ran clear on into the river up to '94.

Q. Didn't the creek dry up sometime down there in '78 or '79?

A. Never saw it dry because there is a little bridge across it about a mile above the mouth and there was always water under it.

Q. About a mile above what?

A. Above the mouth of Sage Creek where it empties into the river. I went down there frequently because I had to go down to get my mail.

Q. Doesn't the water rise below your headgate there from springs?

A. No, never saw any spring that run any water.

Q. Aren't there springs all along that creek above you, clear up as far as the mouth of Piney?

A. No, sir, I think not; no, there is not. There is one right above Jack's, a seep, where you can water a horse.

300 Q. Above Morris'?

A. Yes, there is a seep there where you can water some stock, but I know that creek just as well as I know anything; I have camped on it time and time again and I never seen any spring like that.

Q. Have you attempted to farm there since '96?

A. No, sir.

Q. Haven't put any crops in at all?

A. No, sir, I wanted to wait until I got a better water right; I knew I wouldn't raise anything.

Q. And you say these defendants have taken the water out every year since '96, including the year '96?

A. Yes, sir, since '94.

Q. Since '94?

A. Yes, sir, since '94.

Q. Didn't they use the water in '92 and '93?

A. Yes, sir, I had plenty of water.

Q. Didn't they, the defendants?

A. No, they were not there I guess; I am not sure what year they come in there, but pretty soon after they come in the water begin to shut off.

Q. Didn't they come in there in '92?

A. I believe some of them were there, I think so.

Q. Did they use any water in '92?

A. I don't think so much; '94 was the first we were shut off. Yes, they did, that's right, they used water in '93, late in the fall we run short of water in '93 I know that. In '93 I saw we
301 were not going to have water enough to cut the oats and I cut it for hay; I would have had to irrigate it again to make oats and we didn't have the water to do it with.

Q. As I understand you, you have not demanded any water from any of these defendants since 1896?

A. No, sir.

Q. It was in 1896 that you and Morris went up the creek and saw some of the defendants?

A. Yes, '95 and '96, both.

Q. And investigated the use of the water by the defendants?

A. Yes, sir.

Q. Since that you have not investigated?

A. No, not after I lost that suit, I saw it was no use to put in any more crops until I got the water case settled.

Q. What has become of your ditch that you had there, is it filled up?

A. It did fill up considerable, but it's a big ditch now and a good one.

Q. You have not cleaned it out?

A. Yes, sir, come pretty near getting in another crop, shipped my grain out there and everything.

Q. That's since this suit was commenced?

A. Yes, sir; Mr. Hathhorn made me believe the suit was going to come off and I shipped my grain out there.

302 Q. Have you any other available means of getting water on this land of yours besides taking it from Sage Creek?

A. No, sir.

Q. Isn't it true that the Government has surveyed and is about to construct a large canal out of the Stinkingwater up above Cody, and take it down over the valley so as to cover all of the lands below it, including your lands and Morris'?

By Mr. McCONNELL: We object to that as irrelevant and immaterial.

A. There is talk of it; there is talk of a ditch there, and I saw the surveyors there, that's all I know, he said they was surveying that ditch.

Q. If that ditch is constructed on the line upon which it is surveyed, could you get water from it to irrigate your land?

By Mr. McCONNELL: We object to that as irrelevant and immaterial.

A. Well, it's five miles from my place to the ditch; I live five miles away.

Q. But your land lies under the proposed ditch?

A. Yes, sir.

Q. So that if the ditch is constructed you could get water from it to irrigate your lands?

303 A. I don't understand it that way at all, because a man has got to file a homestead on a piece of land to get the water; the water goes with the land, and I own this land; I would have to file a homestead on the Government land in order to get that water.

Q. Could you buy it?

A. No, sir, it's not for sale, that's the way I understand it. And still that ditch ain't there and I may not live to see it there.

Q. Does any other person except the defendants in this case take water out of Sage Creek above you?

A. No, sir, except the railroad company bought a water right from Mr. Bennett, that's the talk, that's my understanding; they have got a pipe and keep a tank filled where they water their engine and take water out of the creek. I understand they bought twenty-five inches there from Mr. Bennett, and Mr. Bennett, I suppose, will have the next water after we get ours, that he has got the first right in Montana.

Q. Under the decree of the Carbon County Court?

A. Yes, sir.

PLAINTIFF'S EXHIBIT "B."

Timber Culture Ditch.

Taken out of Sage Creek a tributary of Stinkingwater River, on or near S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Sec. 18, T. 57 N., 97 W., running thence 24° E. of S. 88 rods, thence 30° E. of S. 32 R. thence 9° S. of E. 22 R. 4 links, thence 42 E. of S. 24 R. 10 links, 304 thence 12° E. of S. 8 R. thence 12° E. of S. 8 R., thence 12° N. of W. 16 R., thence 45° S. of W. 64 R., thence 25° E. of S. 120 R., thence $31\frac{1}{2}^{\circ}$ E. of S. 147 R. 4 links to the north line of Sec. 30, T. 57 N., R. 97 west. Water was first run through said ditch on August the 4th, 1891.

(Morris vs. Bean et al. Plaintiff's Exhibit "B." H. L. W.)

PLAINTIFF'S EXHIBIT "B-2."

THE STATE OF WYOMING,

Fremont County, ss:

This certifies that Josiah Cook, Esq., was a duly elected and fully qualified Justice of the Peace in and for said county in said State, from the first Monday in January, 1891, to the first Monday, in Jan., 1893, that all official acts done by him within said dates is entitled *in full faith and credence*.

305 In witness whereof, I have hereunto set my official signature, attested by my official seal, the seal of said County this Nov. 15th, 1893.

J. A. McAVOY,

*County Clerk and the Proper Certifying
Officer under the Laws of Wyoming to
the Official Capacity of Notaries and
Justices of the Peace.*

[SEAL.]

J. A. McAVOY,

Co. Clerk.

(Plaintiff's Exhibit "B-2." H. L. W.)

PLAINTIFF'S EXHIBIT "B-3."

*Statement of Claim to Water Right, by T. N. Howell, Owner of the
Timber Culture Ditch.*

TERRITORY OF WYOMING,

County of Fremont, ss:

I, T. N. Howell, being first duly sworn, do depose and say that I am the owner of the above-named ditch, situated in Water District No. 8, Fremont County, Wyoming Territory, and I make this

statement for the purpose of securing the right to the water of Sage Creek heretofore appropriatd by me and the right of way for said ditch on the line shown by the accompanying—

1. The name of said ditch is Timber Culture.
2. The name of the owner of said ditch T. N. Howell.
- 306 3. The postoffice address of the owner of said ditch is Lovell, Wyoming.
4. The headgate of said ditch is located on the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Sec. 18, T. 57 N., R. 97 W.
5. The general course of said ditch is S. E. and the line of said ditch is more particularly shown by the accompanying —.
6. The name of the natural stream from which said ditch draws its supply of water is Sage Creek, a tributary of Stinkingwater River.
7. The length of said ditch is one and one-half miles.
8. The width of said ditch is 8 feet at the top and six feet at the bottom.
9. The depth of said ditch is one foot.
10. The grade of said ditch is one-fourth inch to the rod.
11. The carrying capacity of said ditch is — cubic feet per second of time.
12. Work was commenced on said ditch August 1st, 1890.
13. Water was appropriated from said ditch for N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, and the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, S. 30, T. 57 N., R. 97 W.
- 307 14. The number of acres of land lying under and being and proposed to be irrigated by water therefrom is 160 acres.

T. N. HOWELL.

Sworn to and subscribed before me this 7th day of Sep., 1891.

JOSIAH COOK,
Justice of the Peace.

(Plaintiff's Exhibit "B-3." H. L. W.)

[Endorsed:] Stat. Claim to W. Right by T. N. Howell, taking water from Sage Creek, a tributary of Stinkingwater River.

STATE OF WYOMING,
Fremont Co. Clerk's Office,—No. 5184.

Filed in this office for record at 10 o'clock A. M. Oct. 28, 1891, and recorded in Book A. of W. R. in the office of the State Engineer at pages 130 and 131, Miscellaneous Records.

J. A. McAVOY,
County Clerk and Reg. Deeds.

Recorded by State Engineer for Clk. Fremont Co. Wyo. Fees paid.

(Plaintiff's Exhibit "B" to Deposition of T. N. Howell.)

308

PLAINTIFF'S EXHIBIT "A."

(William A. Morris vs. J. N. Bean et al. Plaintiff's exhibit "A."
H. L. W.)

Receiver's Final Receipt.
No. 197.

Declaration,
No. 60.

Desert Land Act of March 3, 1877, and Act of March 3, 1891.

LAND OFFICE AT LANDER,
WYO., Feb. 6, 1903.

Received from Thomas N. Howell, of Big Horn County, State of Wyoming, the sum of two hundred dollars and — cents, being final payment of one dollar per acre for the W. $\frac{1}{2}$ N. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$, and N. $\frac{1}{2}$ S. E. $\frac{1}{4}$, Sec. 29, T. 57 N., R. 97 W. containing 200 acres, at one dollar and twenty-five cents per acre, the sum of twenty-five cents per acre having been heretofore paid, as per Original Receipt No. 60.

MINNIE WILLIAMS, *Receiver*.

\$200.00.

(Morris vs. Bean et al. Plaintiff's Exhibit "A." H. L. W.)

[Endorsed:] Exhibit "A" to the Deposition of T. H. Howell. Receiver's Final Receipt. Desert Land Act March 3, 1877, and Act March 3, 1891. U. S. Land Office at Lander, Wyo. No. 197.

309

Deposition of Charles C. Ward.

Examination in chief.

By Mr. McCONNELL:

CHARLES C. WARD, having been first duly sworn upon examination in chief by Mr. McConnell, testified as follows:

Q. State your full name?

A. Charles Clarence Ward.

Q. What is your profession, Mr. Ward?

A. I am a civil engineer.

Q. How long have you been a civil engineer?

A. Twenty years, pretty close to it.

Q. In your profession as a civil engineer have you had any experience in measuring water?

A. Yes, sir.

Q. State whether you have made some computations as to the carrying capacity of two ditches, one belonging to one T. N. Howell and the other to William A. Morris?

A. I have.

Q. State upon what data you made the computations and what is the carrying capacity of each ditch?

A. The ditch belonging to Mr. Howell, at the size of the ditch given me as six feet wide at the surface, with water five feet wide at the bottom and sixteen inches deep, and a grade of a quarter of an inch to the rod—the capacity of that is thirteen and seven-tenths cubic feet per second, five hundred and forty-eight miner's inches. The other ditch belonging to Mr. Morris, the size of the ditch is three feet on the top, the water two feet wide at the bottom, twenty inches deep, grade of eighteen feet to the mile, which gives a capacity of fourteen and six-tenths cubic feet per second, equal to five hundred and eighty-four miner's inches.

Q. How many miner's inches correspond to one cubic foot per second?

A. Forty.

Q. So the number of cubic feet per second multiplied by forty gives the number of inches?

A. Yes, sir.

Cross-examination.

(By Mr. GODDARD:)

Q. You never saw those ditches?

A. No, sir.

Q. In making these computations do you take into consideration the structure of the headgate?

A. No, sir.

Q. On the pressure on the headgate?

A. No, no computation made on that basis.

Q. You don't make it under the provisions of the Statutes of Wyoming for the measurement of water?

A. No.

Q. And you don't make it under the provisions of the laws of the State of Montana as to the measurement of water?

311 A. No, sir, make the measurement on the capacity of a ditch having that grade and that size, under the supposition that the headgate will allow the ditch to carry all the water of that depth and width.

Q. Would it make any difference about what pressure was on the headgate as to the carrying capacity of the ditch?

A. It would make a little difference in the amount that would enter the headgate, but after you got through the headgate it would make no difference.

Q. You assume that this ditch has this capacity at the weakest point, smallest point?

A. Yes, sir.

Q. And that this grade is uniform?

A. Yes, sir.

Q. Well, where did you get your estimate as to the equivalent of one cubic foot per second of time in inches?

A. That's according to the Montana law, I understand. I understand that forty miner's inches is equivalent to a cubic foot.

Q. You don't know what the law of Wyoming is on that?

A. No, sir.

Q. And you make that computation as to the inches under the miner's rule?

A. Yes, sir.

312 Cross-examination.

(By Mr. PIERSON:)

Q. To what extent have you measured ditches of given depth and width to ascertain the amount of water flowing in them?

A. I have measured ditches in California, Washington and Montana.

Q. By what method do you determine the capacity of these ditches?

A. Kutter's formula.

Q. And then by that formula you assume that the ditch has a straight uniform bank?

A. **Has a moderately uniform bank.**

Q. You are not allowing for any curves in the ditch?

A. It would make no difference.

Q. It would make no difference?

A. No, sir.

Q. Sharp curves in the ditch would make no difference in the carrying capacity of the ditch?

A. No, sir.

Redirect examination.

(By Mr. McCONNELL:)

Q. Mr. Ward, in your estimate of the carrying capacity of these ditches, I will ask you whether or not you are governed by the rules that are established by practice, by experimentation, and adopted as standard rules among engineers?

A. **I am.**

313 Q. Now, what authority are you governed by in that regard?

A. By Trautwine's Civil Engineer's Handbook, and Wilson's Manual of Irrigation Engineering.

Q. Are those standard works?

A. They are.

Q. Adopted by the profession of engineering?

A. Yes, sir.

Q. And under those rules the computations you have given, based upon the data furnished you, show the actual carrying capacity of those ditches?

A. Yes, sir.

Q. Before the Act of 1889 the law of Montana provided for the measurement of ditches a certain box or flume placed level with an opening at the bottom of six inches, slide to be put into that opening to close it; the condition of things below the opening in the flume should be free from impediments or anything that would im-

pede the free flow of water when it went through, and then the water brought to an eddy in the box above the board across the box in which the slide was placed at a height of three inches above the upper portion of the six inch opening. Then this slide to be withdrawn one inch would give six inches, two inches would give twelve inches; multiply the number of inches the slide was withdrawn by six to give the number of inches of water flowing through.

314 Are you familiar with the new rule of measuring water, the rule under what's known as the Wilson Bill?

A. I have had some information on that.

Q. Is there any practical difference between the old statutory rule and the new one, does it give the same result practically?

A. I think the old method gives a little bit more water.

Q. Is there any material difference?

A. Not a great deal; it would depend somewhat on the amount of running water.

Q. How, suppose a box was made twenty-four inches wide with a headgate to it to be moved or raised, and then filled with water kept full of water to the height of three inches above the aperture raising it one inch from the bottom of the box, then two inches and so on, would the number of inches obtain- by multiplying the depth of the opening made by the raising of the headgate, together with the width of the box, correspond in inches with the statutory method I have just described?

A. It would very nearly.

315

Deposition of Robert Godfrey.

Direct examination.

By Mr. McCONNELL:

RUBERT GODFREY, having been first duly sworn upon examination by Mr. McConnell testified as follows:

Q. Where do you reside, Mr. Godfrey?

A. Lowell, Wyoming.

Q. How long have you resided there?

A. Fifteen years.

Q. What business are you engaged in?

A. Saloon business.

Q. And how far is your place of business from the ranch of Mr. Howell?

A. I think it's about—Mr. Howell's place is two miles.

Q. The one on which the water in controversy here in this law suit is?

A. I think it's about nine miles.

Q. How far is it from the ranch of Mr. Morris?

A. Eighteen.

Q. Now did you ever live nearer to Mr. Morris' ranch than you do now?

A. No, sir.

Q. Are you acquainted with his ranch?

A. Yes, sir.

Q. Are you acquainted with his ditch?

A. Yes, sir.

Q. When did you first become acquainted with his ditch?

A. It was 1889.

Q. 1889?

A. Yes, sir.

316 Q. Was that before or after he had changed the ditch?

A. I think it was before.

Q. Were you acquainted with it at the time he changed it, at the time he changed the ditch? You knew of the change at the time he made it, when he dug the new ditch?

A. Not exactly at the time, no.

Q. Shortly afterwards?

A. Yes, sir.

Q. Now, how often have you seen that ditch?

A. A good many times.

Q. Through what years have you seen it?

A. I have seen it every year since it was built.

Q. Up to the present time?

A. Yes, sir.

Q. State whether or not you have seen him using water through it upon his ranch.

A. I have.

Q. How frequently?

A. Every summer season that I have been there.

Q. Now, what character of crops did he raise?

A. Alfalfa, oats and garden stuff.

Q. Raise any wheat?

A. Yes, sir.

Q. Can you tell anything about the approximate acreage that he had in these different crops from the beginning and on up from the time you first became acquainted with it?

A. I think when I first became acquainted with his place there, he had in about forty or forty-five acres.

317 Q. State whether that was increased, diminished or left the same.

A. Increased.

Q. To what extent?

A. I couldn't tell you; it was increased, though, I know that.

Q. Now, as to the productiveness of his land when he had water; what have you to say?

A. Good.

Q. Now, from the time you first became acquainted with it, and along up to '93 or '94, state what you may know in regard to the amount of water which went down to him.

By Mr. GODDARD: We object to this as incompetent. It is not shown that he had any experience in irrigating except a saloon, and is not acquainted with the measurement of water.

A. I worked for Mr. Morris in 1889, and I know there was plenty of water went by, run clear to Stinking water, clear to the mouth.

Q. After he used what he needed?

A. Yes, sir.

Q. Well, did you observe that in subsequent years after '89, that water went past after he used all he wanted?

A. Yes, sir.

Q. How many years?

A. I think up to '92.

Q. Now, how has it been since that time?

A. It has been dry down where we live.

Q. Have you observed the creek along about his place, and above his place for several years past?

318 A. Yes.

Q. In the irrigating season?

A. Yes, sir.

Q. In July, say, what would be its condition as to whether it would be wet or dry?

A. For the length of three years that I know of it at this time of the year, it would be dry.

Q. How far up the creek above his place would it be dry; how many miles or rods?

A. As to that I couldn't say.

Q. Are you acquainted with these defendants that live in Montana across the line from Wyoming?

A. I am acquainted with some of them.

Q. Do you know when they settled in that country, what year?

A. No, I couldn't say, exactly.

By Mr. GODDARD: We object to the question unless it is confined to the defendants whom he knows, and as to his own knowledge as to where they settled, or their predecessors in interest.

Q. Do you know John Bean?

A. Yes, sir.

Q. John Sadring?

A. No, sir.

Q. L. O. Diltz?

A. No, sir.

Q. Allen P. Graham?

A. Yes, sir.

Q. William Eley?

A. No, I don't know him.

Q. Curtis Beeler?

A. No, sir.

Q. Charles Ingram?

A. Yes, sir.

319 Q. W. B. Bainbridge?

A. Yes, sir.

Q. C. Runyan?

A. Yes, sir.

Q. William Sholtz?

A. No, sir.

Q. C. E. Steele?

A. Yes, sir.

Q. Bert Bent?

A. Yes, sir.

Q. Wallace Bent?

A. Yes, sir.

Q. John Rhodes?

A. No, sir.

Q. F. Banderhoff?

A. No, sir.

Q. C. S. Erickson?

A. Yes, sir.

Q. Do you know Zachary?

A. Yes, sir.

Q. Tillman C. Graham?

A. No, sir.

Q. Pauley. James?

A. No sir.

Q. C. M. Brown?

A. No, sir.

Q. Bowler, John?

A. Yes, sir.

Q. J. A. King?

A. I am not acquainted with him.

Q. A. Holm?

A. No, sir.

Q. M. Young?

A. Yes, sir.

Q. Corbett Bennett?

A. Yes, sir.

Q. Michael Wrote?

A. Yes, sir.

Q. Now, then, do you know whether they ever used any of the water at any time before the year 1903; before last year, out of Sage Creek in Montana, Carbon County?

A. Well, I never was at their ditches; I know they raised crops.

320 Q. Did you ever know of any crops being raised in that country without being irrigated?

A. No, sir.

Q. Now, do you remember about the time that these men that I have enumerated settled in that country?

A. About twelve years ago. I think.

By Mr. PIERSON: We move that the answer be stricken out as not responsive to the question, and indefinite.

Q. Now, what do you remember as to the time that this shortage commenced with Mr. Morris; as to its being connected with the time that these men settled in the country and commenced using that water?

By Mr. GODDARD: We object to that on the ground that he has not stated that he knows when they did settle, and has not testified that any of them used water, and it's incompetent.

Q. Was the shortage—did that begin at the time these men settled in that country?

By Mr. GODDARD: We object to that on the ground that he don't know when they settled, and as leading and incompetent.

A. The shortage was after they settled.

Q. How was the water before that time?

A. In regard to the amount?

321 Q. Yes.

A. There was plenty of water.

Q. Now, are you acquainted with the ditch and ranch of Mr. Howell?

A. Yes, sir.

Q. When did you become acquainted with it, with his ditch and with his ranch?

A. I am a poor man to remember dates.

Q. Just approximate it, as nearly as you can?

A. Well, I will say twelve years ago.

Q. Have you ascertained the size of his ditch as to water; is it a large ditch or a small ditch?

A. It's a small ditch.

Q. Have you ever seen any water being used through it?

A. Yes, sir.

Q. Who was using it?

A. A gentleman by the name of Arnold, working for Mr. Howell at the time.

Q. What character of crops did Mr. Howell raise on this place?

A. Oats.

Q. Anything else?

A. Oats is all that I know of.

Q. Raise any hay, any alfalfa?

A. He seeded some.

Q. What became of it?

A. It died out.

Q. Why did it die out?

A. Want of water.

Q. What was the matter about the water?

A. There was none.

Q. Was that the time it quit coming down?

322 A. Yes, sir.

Q. Do you know whether or not when he first commenced irrigating there, he had plenty of water, or whether there was a scarcity of water?

A. I think he had plenty from the crops he raised there.

Q. Did you ever work on his place?

A. No, never worked on that place, no sir; I was there, and helped shock some grain about half a day.

Q. When was that?

A. Well, as I say, I can't remember the date.

Q. It was at the time he was getting water?

A. Yes, sir.

Q. His place is a desert now, isn't it?

A. It is.

Cross-examination.

(By Mr. PIERSON:)

Q. Mr. Godfrey, isn't there water running down this stream in the spring of the year, in this present year?

A. Yes, sir.

Q. The snow water?

A. Yes, sir.

Q. At what time of the year does that water fall in the creek?

A. Why, I think it commences to fall about the middle of June, or the first of June to the middle.

Q. Did you have water where you reside up to the first of June, each year?

A. Not of late years.

23 Q. Haven't you had any water in the spring of the year?

A. Well, right in the spring, before they commence irrigating.

Q. You were speaking about when the snow goes off?

A. Yes, sir.

Q. What time of the year does the creek dry up at your place?

A. About the first of June, or before.

Q. You spoke about Mr. Howell seeding some alfalfa, and it dried up. Do you know what year he sowed that alfalfa; can you give us the number of years ago it was?

A. No, I couldn't answer that, and answer it correct, that I know of, I can't remember the date.

Q. You spoke about that you have been acquainted with his ditch and ranch for twelve years?

A. Yes, sir.

Q. Was it twelve years ago, or eleven years ago, that he sowed that alfalfa?

A. I don't think it was that long.

Q. You don't?

A. No, sir.

Q. You would not attempt to say how long it was?

A. No.

Q. The creek dried up at your place in 1892. Do you know what condition the creek was in at Morris' at that time?

A. At Morris'?

24 Q. Yes.

A. I believe he had water at that time.

Q. Do you know what condition the creek was in at Howell's in 1892?

A. Why, at what time of the year?

Q. What you said, the first of July.

A. It was dry.

Q. You say you believe that Mr. Morris had water in July, 1892?

A. He did, in the forepart of the season.

Q. How long in July?

A. As to that I couldn't say.

Q. Do you remember of seeing water there in the creek in July, 1892, at Morris' place?

A. I believe there was some standing in puddles.

Q. You did not see any running water?

A. No, sir.

Q. Do you remember of being there in July, 1892, or any time thereafter?

A. I pass there every season, but I can't say positive that I was there in July, 1892.

Q. Well, in the next month, August, how did the quantity of water at Morris' place compare with that in July?

A. It would be less.

Q. Now, I understood you to say that you lived where you do now, for the last fifteen years?

A. Yes, sir.

325 Q. What has been the occasion of your residing where you do now for the last fifteen years?

A. The occasion of my residing there?

Q. Yes, sir; how did you come to be there that length of time?

A. I had a ranch on Stinkingwater.

Q. Have you irrigated that ranch from Stinking Water?

A. Yes, sir.

Q. And not from Sage Creek?

A. No, sir.

Q. Do you know who located this Morris' ranch?

A. I do not.

Q. Was it originally located by Mr. Morris?

A. He was there when I came to the country.

Q. Did not Mr. Morris have plenty of water late in the season, we will say in August, 1893?

A. 1893?

Q. Yes, we will say during the month of August.

A. I could not say.

Q. You don't remember?

A. No, sir.

Q. Did he have plenty of water during the month of July, 1893?

A. I couldn't say as to that.

Q. As to Mr. Howell, did Mr. Howell have plenty of water during the month of July, 1893?

A. I can't remember dates at all.

Q. Well, do you remember as to the month of August, 1893?

A. No, sir.

326 Q. Don't you know whether they had water or not?

A. No.

Q. Well, the following year, 1894, you remember that Mr. Morris had plenty of water during the month of July, 1894?

A. There has been a scarcity of water that I know of, since '93.

Q. Since '93?

A. Yes, sir.

Q. That you know of?

A. Yes, sir.

Q. Now, when did that scarcity begin?

A. Began about the first of June.

Q. Would that scarcity of water you have reference to be both Howell's ditch and at Morris' ditch?

A. Yes, sir.

Q. Well, who would get the most of the water while it was scarce, Morris or Howell?

A. Neither of them got any, that I know of.

Q. There wouldn't be enough there to irrigate?

A. No, sir.

Q. But prior to 1893, you would not attempt to say whether they had water in July and August or not?

A. No, sir; I would not.

Q. As a matter of fact, that creek has always fallen, has it not, Godfrey, in the months of July and August?

A. Yes, sir.

Q. Practically dried up every year that you have known it?

A. No, not every year that I have known it.

Q. Not every year?

A. No, sir. Well, it has dried up some years.

Q. Well, do you remember when it dried up?

A. I think in '93 was the first.

Q. You think that's the first?

A. That I recollect of, yes, sir.

Q. And then it dried up about the first of June?

A. Yes, sir.

Q. Do you remember whether or not it dried up in 1889, the year I have reference to, down at the mouth?

A. No, sir; it did not.

Q. Or in 1890, was it dried up there that year, 1890, at the mouth or at Howell's place?

A. No, sir; I don't think it was.

Q. You don't remember, though, you are, not positive about it?

A. Well, I am pretty sure.

Q. And in 1891, do you remember whether or not the creek was dry in August, at your place?

A. It was not.

Q. It was not, at any time?

A. No, sir.

Q. How did the quantity of water running in the creek in 1891 at Howell's place during the month of August, compare with what was running there during the month of May, of that year?

A. There is more in May than there is in August.

Q. In '91, I am speaking about. Could you state what proportion there was more there in May than there was in the month of August?

A. I couldn't say how much more.

Q. Couldn't say whether there was twice as much or three times as much?

A. It wouldn't be twice as much.

Q. It would not be?

A. No, sir.

Q. Well, as you saw this stream in 1891 in the month of August, how wide was it at Howell's place?

A. Oh, probably six or seven feet.

Q. Wide?

A. Yes, sir.

Q. Flowing water?

A. Yes, sir.

Q. How wide was the water where you saw it running?

A. Probably six feet.

Q. And how deep?

A. Oh, ten inches.

Q. Do you mean to say there was that quantity of water running there during the month of August, at all the times?

A. Well, I don't know.

Q. You don't know whether there was or not?

A. There is more water running there in May than there is in August.

Deposition of T. N. Howell (Recalled)—Direct Examination by Mr. McConnell.

Mr. T. N. HOWELL recalled.

(Examination by Mr. McCONNELL:)

329 Q. I wish you would state what the reason is, if there is any, that you could not cultivate alfalfa and get at least one crop since this shortage has commenced.

A. I sowed my alfalfa seed in the spring and the fifteenth of June I didn't have a drop of water and my alfalfa dried up. I sowed the biggest crop in '97; I sowed seventy acres in 1897; that's the last crop I sowed. I said yesterday '96 but I was looking at my books and I find I tried to raise four crops instead of three, I lost four crops in '94, 5, 6 and 7.

Q. Now you say you sowed it in the spring?

A. Yes, sir.

Q. Now would the alfalfa be there the next spring?

A. No, sir.

Q. What would become of it?

A. It would die for the want of water.

Q. What time of the year is it necessary to irrigate alfalfa to keep it alive so as to have a crop the next year?

A. All the time, every few weeks it has to be irrigated.

Q. Now could you sow it in the spring and get one crop off of it, one cutting?

A. No, sir, not out there.

Q. You said something yesterday about the water in that creek

running down to the mouth, if I understood you correctly, in the years '89 and '90. What time did you mean to fix it?

330 A. Water run into Stinkingwater through '92 and it has never run into Stinkingwater in the fall since. Run every year to '92; in '93 it dried up late in the fall, as I had to cross right above the mouth of it to go after my mail.

Q. In making a statement contrary to that yesterday you made a mistake?

A. Yes, if I said '97 and 8 it was a mistake. '93 was the first year it dried up.

Q. What year was it that Arnold worked at your place?

A. 1893.

Cross-examination.

(By Mr. PIERSON:)

Q. Could you give me the description of the forty on which your house stands Mr. Howell, on this land you described in your complaint?

A. The house is not on my land.

Q. It isn't?

A. No, sir, just one side, it isn't quite on the land.

Q. Could you give me the description of the land that your house is on?

A. No.

Q. Couldn't do it?

A. No.

331

Deposition of Charles W. English.

CHARLES W. ENGLISH having been first duly sworn, upon examination by Mr. McConnell, testified as follows:

Direct examination by Mr. McCONNELL:

Q. What is your full name?

A. Charles W. English.

Q. Are you acquainted with T. N. Howell, intervener in this case?

A. Yes, sir.

Q. Did you ever reside on his place in Wyoming, the water appurtenant to which is in controversy in this action?

A. I went to work for Mr. Howell in, I think the fall of '90, I can tell you. (Witness refers to memorandum.) I commenced work for Howell in '90; I worked for him in '91 and '92; I commenced in December.

Q. December '90?

A. December '90.

Q. Now what work did you do?

A. I had charge of improving his ranches.

Q. Are you acquainted with that ditch that is on his place that's in controversy in this case?

A. Yes, sir.

Q. When was that constructed?

A. In '91. Well, he had made the ditch before I got there.

332 Q. That was in December '90.

A. Yes.

Q. It was already made when you got there?

A. Yes.

Q. Now when did you use water through it, if at all?

A. Well, sometime in '91, in the spring; I forget exactly what time it was I took the water out and put it in the ditch.

Q. What use did you make of it?

A. I run it down to the timber culture, it was a timber culture then.

Q. What did you irrigate?

A. Well, I put in some timber culture then and sowed some alfalfa.

Q. Irrigated trees and alfalfa?

A. Yes.

Q. How much alfalfa did you raise that year?

A. We didn't get any that year but it come up very well.

Q. Did you cultivate that the next year?

A. There seemed to be something, the winter killed it out so we didn't do much with the alfalfa.

Q. Did you raise any grain?

A. The next year we put in a crop of oats and wheat.

Q. How much?

A. About forty acres—about two or three acres of wheat.

333 Q. State whether that land is productive or not.

A. I think it was the biggest crop of wheat I ever saw grow.

Q. Big enough to hide a horse?

A. Well it was all we could do to run a binder through it.

Q. So heavy?

A. Yes, sir.

Q. Do you remember the circumstances of a pony getting lost in the oats and you could not find him for some time?

A. No, we didn't use them when I was there, we didn't have any ponies then; we worked everything we had then.

Q. Were you acquainted with it subsequent years to '92?

A. '92, that's the year we raised the crop.

Q. Well, but after that?

A. Well, I passed there.

Q. Are you acquainted with the conditions there as to whether there was a shortage there over what there was when you commenced?

A. Well, in the fall of '93 I was down through there and everything seemed to be dried up on the ranch, there was nothing there; there didn't seem to be any water there; there was a little water at Morris', not very much.

334 Q. Are you acquainted with the Morris ranch and water and ditch?

A. '93 I was. Yes, I have been there; I think I was there pretty near every month in the year while I was in that country.

Q. When did you leave that country?

A. I left in the fall of '92.

Q. You have not been there since?

A. Yes, I was down there in '93; I took a band of sheep down there.

Q. Have you been acquainted there since '93?

A. Been down there once or twice.

Q. Not much?

A. No.

Q. Do you know whether or not Mr. Morris used water on his ranch from Sage Creek while you were there?

A. Yes.

Q. Have plenty of it?

A. Yes.

Q. See him use it?

A. Yes, sir.

Q. What kind of crops did he cultivate?

A. Just as big as I ever saw grow.

Cross-examination.

(By Mr. PIERSON:)

Q. You state Mr. English that the alfalfa which was sown in '91 the winter killed?

A. Yes, sir.

Q. Can you give any particular cause for its winter killing.

335 A. Because I hadn't attended to it is all.

Q. In what way?

A. Because I was tending to two ranches and don't suppose I attended to them just as I should; had plenty of water but I was short of help and didn't get to irrigate late enough.

Q. Didn't get to irrigate Howell's place?

A. That was the trouble, no.

Q. Now, I understand that the alfalfa was sown there in '91, was it?

A. Yes, sir.

Q. What time was it in 1893 you saw the water at the Howell place?

A. I was by there sometime in December, the first of December I took a band of sheep down there and crossed Sage Creek below Mr. Morris'.

Q. That's '93?

A. Yes, sir.

Q. The irrigating ditches were not running at that time, it was too late for irrigation?

A. No, there was a quantity of water running out on the place above; we had a hard time to get through a good many places and get on the main road, would get mired down going over. We come across over the flat and we got mired down two or three times.

Q. What flat?

A. I should say as far as the irrigating is up there in Wyoming; we come across from Gebo or whatever you call it, anyhow
336 we come across with our sheep, and when we undertook to cross—we got the sheep over across Sage Creek, but when we undertook to get across with our teams and so on we got mired down and had a great time to get across on the Sage Creek road.

Q. You mired on Sage Creek then?

A. No, on the flats before we got to Sage Creek.

Q. Was there any water in Sage Creek up there where you crossed it?

A. Very little.

Q. And still lower below Morris'?

A. When we crossed the sheep below Morris' the water didn't bother us at all.

Q. The creek was practically dry?

A. Yes, sir.

Q. Was there any water at Morris' to irrigate in December, 1893, when you saw it?

A. I don't know where we did water our sheep, but we had a pretty hard time to get water for the sheep.

Q. There was not nearly as much water at Morris' in 1893 as there was up on the flat?

A. No, sir, that flat was a lake I called it.

Q. How many miles was it from the flat that you speak of down to Morris'?

A. I should think about—I would say fifteen miles.

337 Redirect examination.

(By Mr. McCONNELL:)

Q. What caused that wet condition of the land where you mired?

A. I couldn't tell; it was water, that's all.

Q. Water just turned out of the creek?

By Mr. PIERSON: We object to that on the ground that it's irrelevant and leading.

Q. State whether or not you know of irrigating being done by men who settled on Sage Creek in Montana which caused this wet condition of the country there that you mired in on this trip?

By Mr. PIERSON: We object to that on the ground that it is not confined to any of the defendants in this case. And it's incompetent for he has stated he doesn't know.

A. All I can say, I saw water running where I never saw it before, and I have been over that country a long time.

Q. It was astray somehow?

A. Yes, sir.

Cross-examination:

(By Mr. GODDARD:)

Q. Where was it that you mired down?

338 A. I couldn't tell you exactly. After we come over the bench and come down off of the bench we—it's been so long I couldn't exactly tell you the place but I could take you to it.

Q. How far above the mouth of Piney?

A. Well, I think probably three or four miles.

Q. On which side of the creek?

A. I was on the south side of the creek of course, I was going through there, over the bench there.

Q. What time in December was it?

A. Well, sir, it was sometime along the first or along about that time in December; I think the first.

Q. What time was it you mired down?

A. Well, that's about the time; along about the first of December.

Q. The ground was not frozen at all?

A. No, sir.

Deposition of Michael Wrote.

MICHAEL WROTE, having been first duly sworn, upon examination by Mr. McConnell testified as follows:

Direct examination by Mr. McCONNELL:

Q. Where do you reside Mr. Wrote?

A. Over on Sage Creek.

Q. Are you one of the defendants in this lawsuit?

A. Yes, sir.

Q. What time did you settle on Sage Creek?

A. '92.

Q. What time in '92?

A. October.

339 Q. One of the first settlers in there after the Reservation was opened?

A. Yes, sir.

Q. Previous to that time, the fall of '92, there was no person living in that country and taking water out of the creek and irrigating the lands?

A. I believe a man by the name of Neel, a sheepman, and another man had taken out a ditch above so they wouldn't have to take their sheep so far to water.

Q. On the Reservation?

A. Yes, sir.

Q. At the time you settled there did you know that Mr. Morris and Mr. Howell had taken water out of Sage Creek down below you in Wyoming?

By Mr. GODDARD: We object to that as irrelevant and immaterial.

A. Why, I knew Mr. Morris had.

Q. Did you know Mr. Howell had?

A. No, sir.

Q. Did you learn afterwards that he had?

A. Yes, sir.

Q. Were you one of the fellows he had arrested for contempt of Court?

By Mr. GODDARD: We object to that as irrelevant and immaterial.

A. No, sir.

Q. Didn't get you?

A. No, sir.

340 Q. You were a party to that lawsuit were you not?

By Mr. GODDARD: We object to that as irrelevant and incompetent.

A. Yes, sir; I was not arrested.

Q. Which lawsuit?

A. All of them; they never cut me out of any of them.

Q. How much water did you appropriate there in '92?

A. About three hundred inches.

Q. Three hundred?

A. Yes, sir.

Q. During the irrigating season, July say, how much water was in the creek at the place where you made your appropriation?

A. That was in October; about three hundred inches.

Q. You appropriated it all then?

A. All but very little, may have been three hundred and twenty or twenty-five.

Q. Now, how much does the creek contain there ordinarily in the month of July, '92 and '93 and on since then?

A. About three hundred, three hundred and fifty.

Q. Now, a great many others have appropriated water on that creek too, have they not?

A. Quite a number of them.

341 Q. Mr. Bennett made his appropriation before you did?

A. No, sir.

Q. He didn't?

A. No, sir.

Q. Didn't he get the oldest right under the decree of Judge Henry?

By Mr. GODDARD: We object to that as incompetent.

A. No, sir.

Q. Were you given the oldest right?

A. No, sir.

Q. Who was?

A. Bent.

Q. Was Mr. Bent here the man that had the oldest right?

A. One of them here.

Q. This is Wallace is it?

A. Yes, sir.

Q. He made his appropriation before you did?

A. No, sir.

Q. You made yours first?

A. Yes, sir.

Q. Now, Mr. Wrote you have been using water there every year since you made your appropriation in '92?

A. Yes, sir.

Q. What crops have you raised?

342 A. I raised hay and grain and garden truck.

Q. How many acres did you cultivate the first year, in '93?

A. About two or three acres.

Q. How many in '94?

A. Well, I never measured the exact amount of it but I kept increasing it.

Q. You took up one hundred and sixty acres?

A. One hundred and twenty.

Q. Homestead?

A. Yes, sir.

Q. Get a patent to it?

A. I proved up on it.

Q. Have you the receiver's receipt?

A. Yes, sir.

Q. And you have been cultivating that ever since you settled there in '92?

A. Yes, sir.

Q. And commencing with the year '93?

A. Yes, sir.

Q. Now, how many acres have you in cultivation now?

A. Well, I am irrigating close to a hundred.

Q. How long, how many years, have you been irrigating that many acres?

A. Well, ever since the fall of '92 I would irrigate so as to make wild hay or good pasture.

343 Q. And is that one hundred acres you are irrigating now in domestic pasture?

A. In hay and domestic pasture.

Q. How many inches to the acre do you use?

A. Well, if I have a good big head I can get over it faster; the land lays leveler there and the more water you have the less laterals you have to have.

Q. Who are your neighbors?

A. Rule, Brown, Bents, Grahams, I guess.

Q. How long has Rule been living there?

A. Since last summer, last fall he come in.

Q. Who did he succeed?

A. Bowler.

Q. Bowler was your neighbor before?

A. Yes, sir.

Q. When did he settle there?

A. In the spring of '93.

Q. Now all of these men made appropriations there, did they, on this creek?

A. That is the first settlers?

Q. Yes.

A. Yes.

Q. How many of them made appropriations at the time you did, or shortly afterwards?

A. Why Bowler and Zachary and Crosby.

Q. Is Erickson on that now?

344 A. That's the Erickson ranch, Crosby is on it now.

Q. Erickson is not there now?

A. No.

Q. How do you people manage there when you appropriate all the water and the others appropriate all of it too?

A. They all appropriated water.

Q. They appropriated enough to take it all if they could get it?

A. Now, if I can get a good big head I can get through in about three days.

Q. You and your neighbors agreed then upon using it a certain time and then giving it up to the others; didn't you work it that way?

A. We did up to the time we had the lawsuit.

Q. You mean the lawsuit in Judge Henry's Court?

A. Yes, sir.

Q. Who were your neighbors that did that?

A. Did what?

Q. That agreed that each one would take the water a certain day and take it all?

A. Well, it was Bowler and Pauley and Graham and Bent—

Q. And the Bent boys?

A. Yes, sir.

345 Q. And Michael Wrote?

A. Yes, myself.

Q. How many years did you work that way?

A. About two or three.

Q. When was that suit commenced at Red Lodge?

A. Two years ago, I believe.

Q. Two years ago?

A. Four years ago.

Q. Up to that time you acted in a neighborly way and accommodated each other?

A. Yes.

Q. Did you use all the water, keep it all in use?

A. Well, pretty near all of it.

Q. Are you acquainted with Mr. Howell?

A. Yes, sir.

Q. When did you get acquainted with him?

A. Oh, about '92, I guess I knowed him before that, '90.

Q. See him up in that country looking for water?

A. Yes, sir, he has been up there once that I remember.

Q. Do you know Mr. Morris?

A. Yes, sir.

Q. Was he up there looking for water?

A. They both come up together.

Q. You didn't take them into that arrangement to give them a day's use of the water?

346 A. Yes, sir.

Q. You did?

A. Yes, sir.

Q. How many times was it turned down to them?

A. I don't know about the others but I did when they asked me to.

Q. You did?

A. Yes, sir, and shut the headgate.

Q. And when did you shut it off?

A. About ten days after.

Q. Wasn't it just half a day you let it go down?

A. No, sir.

Q. Did not some other one in Montana get the water when you turned it into the creek?

A. They could have if they had opened the headgates, I guess.

Q. Don't you know they did get it?

A. They may some of them taken it.

Q. You say they may; why do you guess? Is there any doubt about that? Don't you know they did?

A. I wouldn't be right sure whether they took it or not.

Q. Didn't they tell you they did?

A. No, they didn't tell me they did.

Q. Didn't you know they were going to get it?

A. Well, they talked about they ought to get it.

347 Q. Wasn't it their turn to get it when you turned it off?

A. Who do you mean?

Q. Some of your neighbors?

A. No, sir.

Q. But do you know how soon it was after you turned it into the creek that they turned it out?

A. No, sir.

Q. About half a day, wasn't it?

A. I don't think I know anything about that.

Q. Did you ever turn it down any more?

A. That's the only time they asked me; I remember they come up and said they was short of water, and I says all right, I will shut it down.

Q. Did they ever ask you in particular?

A. That is in particular; they come up there and made a trip a purpose to tell me.

Q. Each season you know they were destitute of water and suffering for it, didn't you?

A. No.

Q. Didn't you know they were older appropriators in the water?

By Mr. GODDARD: That is objected to as immaterial and irrelevant.

A. Yes, sir.

Q. Were you not advised that they were entitled to the water in preference to you?

A. When, before the suit or afterwards?

348 Q. Before.

By Mr. GODDARD: We object to that as incompetent and immaterial.

A. Before the suit I didn't think they was entitled to it because they wasn't in the state.

Q. But after you lost the case then you thought they were entitled to it?

A. They must have been or I wouldn't have lost it.

Q. You didn't let it down to them after you lost it?

A. They never demanded it. That day, the time they demanded it, was right shortly after the decree was rendered, I think, and Morris and Howell was up there.

Q. Don't you know that you and your neighbors there who live in Montana that were parties to that suit took the water after that decree was made just the same as you did before?

By Mr. GODDARD: We object to that as immaterial for the reason that the decree was held to be invalid by the Court of Appeals.

A. Didn't shut them off entirely from taking water, didn't say they should not take it at all.

Q. The decree stated you should let water enough down for Morris and Howell, did it not?

349 A. Yes, but it didn't say we should go down there and see about it.

Q. Did you ever try to let it go down there?

A. I never tried to stop it all.

Q. Your neighbors got what you didn't take?

A. I don't know anything about that.

Q. Don't you know they were irrigating the same time you were?

A. I don't know about that.

Q. Don't you know you people in Montana there on Sage Creek have been using that water now for nine or ten years to the almost entire deprivation of Howell and Morris of that water?

A. No, sir.

Q. During the irrigating season?

A. No, sir.

Q. Did you hear the testimony of Mr. Morris yesterday?

A. Heard most of it, yes.

Q. Said he got enough water to raise one cutting of alfalfa and half a crop the second time and none the third.

A. Didn't know he was getting but two.

Q. Did you not know that you were depriving him of water enough to raise his regular crops there all these years?

A. No, sir.

Q. Haven't you been doing it up to the present time?

350 A. Been using the water up to the present time.

Q. And I will ask you if during the irrigating season of

July and August, whether you pay any attention to their rights at all or not.

A. I have not paid any attention to their rights; the decree was declared invalid.

Cross-examination.

(By Mr. GODDARD:)

Q. Mr. Wrote, you have observed the flow of water in Sage Creek ever since 1893, haven't you?

A. Yes, sir.

Q. Every year?

A. Yes, sir.

Q. And every month in the year?

A. Yes, sir.

Q. Now, what has been the usual stage of the water in Sage Creek in the months of July and August?

A. It got pretty low.

Q. State whether or not the water sinks in that creek at any place.

By Mr. McCONNELL: We object to that as not cross-examination.

A. Yes, sir, the water sinks.

Q. At what places?

A. About two miles below the mouth of Piney.

Q. What is the character of the creek-bed there?

A. Why, it's gravel, it's loose gravel.

Q. Is it a sandstone shale formation, any of it?

By Mr. McCONNELL: We object to that as leading and as not cross-examination.

A. It's kind of sandy rock formation.

Q. Now, where is this place below the mouth of Piney with reference to where you live?

A. Well, I believe there is more of it sinks down there than it would above.

Q. How far is this place below you where it sinks?

A. About twelve miles, maybe more, the way the creek runs, at the way the road runs it's about twelve miles.

Q. And did you ever notice the stage of the water at that place and below there late in the season prior to 1892?

A. Yes, sir.

Q. When?

A. 1887.

Q. What was the stage of the water then?

By Mr. McCONNELL: We object to that as not cross-examination.

A. Well, in 1887, the water was in holes at Morris' place above there.

Q. And how about it below there?

A. Well, I didn't go below Morris' place.

Q. Well, was there any running water in the stream at that place?

A. There wouldn't be but very little.

352 Q. Was there enough to irrigate with?

A. No, sir.

Q. What was the occasion of your being there at that time?

A. I was working for the Pitchfork outfit and came by there with a bunch of beef and couldn't find enough water there to cook with except in these big holes.

Q. That was in Sage Creek?

A. Yes.

Q. Now, what has been the condition of the water since that, since 1887 down there?

A. I didn't go back there until '90.

Q. You observed the stream of water there at Morris' and below there in '90?

A. I know we had to go above his place there and camp on the creek.

Q. Why?

A. Because there wasn't water enough for the saddle horses.

Q. Was he irrigating at that time?

A. I don't think he was.

Q. Were you above his headgate?

A. I was pretty well above his headgate.

Q. And how much water was there in the stream there then?

A. I believe there was a whole lot more then than there was in '87; there was more of a seep running through there then.

353 Q. Did you ever know of a time since 1892 in the months of July and August, when all the water was allowed to run down the stream by you defendants? Since '92?

A. I don't remember whether it was ever all in the creek at one time or not; there has been more used since '93.

Q. Do you know of any time when it was all allowed to run down the creek?

A. I don't believe I remember.

Q. If this water were allowed to run down the creek and nobody take it out in Montana, how much water would reach Morris' headgate in say the month of August, ordinarily?

By Mr. McCONNELL: We object to that as not cross-examination.

A. There wouldn't be very much.

Q. Well, how much would that be?

A. Well, I couldn't tell only the times I go by there on account of the place there where it sinks.

Q. You have never had any difficulty, any of you, in getting water up to the first of June there, have you?

A. No, sir, been plenty of water.

Q. Were you ever at Morris' place in '87 and '88 and '9?

A. I was there in '87.

Q. Notice him irrigating any crops there?

354 A. I think that was the spring he came in there; don't know how much work he had done there then.

Q. When were you next there?

A. In '90.

Q. See him irrigating any crops then?

A. I think he **had in a crop then.**

Q. Do you know how much?

A. No, sir.

Q. You don't know to what extent he was irrigating?

A. No, sir, I don't.

Q. Now, have you ever refused at any time to shut the water off at your headgate when either of the plaintiffs have demanded it of you?

A. I have shut it down every time they asked me to.

Q. As I understand you they never asked you but once?

A. They asked me once.

Q. That's when they both came up there together?

A. Yes, sir.

Q. And what year was that?

A. Believe it was '95.

Q. Neither of them have demanded water of you since that?

A. No, sir.

Q. Were you aware of the decision of the Court of Appeals in the Howell case?

A. Heard it after the decision was made.

Q. And from that on, did any of the defendants regard the decree that was made by Judge Knowles?

55 A. I don't believe they ever asked for the water.

Q. I mean, did you consider the decree binding on you after the decision of the Court of Appeals?

A. No, sir.

Q. Now, has there ever been any agreement or understanding between you and any of the other defendants to take this water out of Sage Creek for the purpose of depriving either of the plaintiffs of the water?

A. No, sir, took it out because they had to use it for their crops.

Q. Ordinarily, one settler there could irrigate his crops, when there is a good stage of water in the creek, in two days, could he not?

A. Yes, if they would allow him to take a good head.

Q. If they would all allow one man to use it at a time?

A. Yes, sir, they could.

Q. How far are you above the mouth of Piney?

A. About ten miles.

Q. And how far from Morris?

A. I believe they call it sixteen miles.

Q. How many settlers are there below you and above Morris on Sage Creek?

A. And Piney?

Q. No, just on Sage Creek; just name the men.

A. About eleven or twelve.

Q. Just name them.

56 A. Well there is Adams and Runyan, Beeler, Diltz, Allen Graham, William Ealy, Corbett Bennett, Bert Bent and Wal-

lace Bent, Tillman Graham and George Crosby and Jim Pauley, Tom Rule and myself.

Q. How far is it from your place to Morris' by meandering the creek, to follow the creek around?

By Mr. McCONNELL: All these questions are objected to as not cross-examination.

A. I guess it would be about twenty-five miles.

Deposition of Wallace Bent.

WALLACE BENT, having been first duly sworn, upon examination by Mr. McConnell testified as follows:

Direct examination by Mr. McCONNELL:

Q. Where do you reside, Mr. Bent?

A. On Sage Creek in Carbon County.

Q. How long have you been living there?

A. Been living there since '93.

Q. What time in '93 did you settle there?

A. First of August.

Q. State whether you made an appropriation of water out of Sage Creek?

A. I bought out a right.

Q. Whose right did you buy out?

A. I bought out John Widman.

357 Q. What was the amount of appropriation that you got?

A. The amount of the appropriation was five hundred inches.

Q. How much land did you get?

A. One hundred and sixty acres.

Q. Where is this land situate with reference to the mouth of Piney?

A. About six miles above the mouth of Piney.

Q. Piney is a tributary of Sage Creek?

A. Yes, sir.

Q. How many settlers are there on Piney that take water out of Piney?

A. Oh, there are five or six.

Q. Name them.

Well, J. N. Bean and Young, Bainbridge, Sadring, and King that's all.

Q. Brown, does he use water?

A. No.

Q. What is he doing up there?

A. He has got a little spring and gets a little water out of Piney once in a while.

Q. Then he uses some water?

A. Yes, when he can get it.

Q. What was the first season that you raised a crop there?

A. '93.

Q. How much water did you use?

358 A. I didn't use a great deal that season because I wasn't there myself and the other settlers on the creek used about all of it.

Q. You wasn't in any arrangement then?

A. Not very thoroughly.

Q. And in '94, did you use water?

A. Some, yes, sir.

Q. And '95?

A. Yes, sir.

Q. And from that on down?

A. From that on down.

Q. Were you a party to that lawsuit in the federal court in Helena?

A. No, sir.

Q. Are you acquainted with Mr. Morris?

A. Yes, sir.

Q. And Mr. Howell?

A. Yes, sir.

Q. Do you know their ranches?

A. No, I don't know Howell's ranch; I know Morris'.

Q. Did you know that ranch was there and ditch and water right appurtenant to it at the time you bought out the man you did buy out?

A. Yes, sir, I knew there was some ranches down there.

Q. Taking water out of Sage Creek?

A. Yes, sir.

Q. Did they ever come to you for water?

A. Yes, sir.

359 Q. How many times?

A. Well, I think that Howell come to me for water once and Morris has come three times, I think.

Q. Did he get any water?

A. I don't know whether he did or not.

Q. Did you turn any down to him?

A. No, sir.

Q. Did you swear at him?

A. No, sir.

Q. You were not the one who did that?

A. No, sir.

Q. Did you tell him you were going to have the water as long as there was any in the creek?

A. No, sir, I don't know as I told him that.

Q. That's what you thought, that's what you determined at the time?

A. I determined——

Q. That you would use it yourself and not let him have it?

A. Yes.

Q. You have been carrying it out ever since?

A. Yes.

Q. Did you ever have a meeting in the neighborhood there and resolve that you would not let Howell and Morris have any water?

By Mr. PIERSON: We object to that on the ground that it's irrelevant and immaterial whether there was a meeting or not.

360 A. We never had a meeting for that purpose, but then we resolved that I guess, I did at least; I don't know how the rest of the fellows done.

Q. They didn't let them have any water?

A. I don't know as to that.

Q. Whether they resolved or not, in point of fact they did not let Howell and Morris have any water?

A. I don't know whether they did or not, what the rest of them done.

Q. Well, they used it?

A. Yes, they used water, I know they used water.

Q. You would use it for a day or two, then you would turn it down and let somebody else use it?

A. Well, we did have an agreement to that effect but we didn't get along very well because we had some trouble; there was so little water that one man wouldn't get water that he thought was coming to him, and another man wouldn't think he was getting his water, so our agreement didn't amount to much.

Q. Didn't work out very well in practice?

A. No, it didn't work out very well in practice.

Q. But there was one thing you did agree upon, you didn't allow Howell and Morris to have any?

A. No, sir, I didn't.

Q. You didn't take them into account at all?

A. I didn't, no.

Q. And the others didn't either?

361 A. I don't know about the others.

Cross-examination.

(By Mr. PIERSON:)

Q. Mr. Bent, did you permit any water to run down past your headgate in '92?

A. '92?

Q. Yes, during the irrigation season; what time did you locate there?

A. In '93.

Q. You don't know what occurred in '92?

A. No, I don't know what happened in '92 only from hearsay.

Q. The water was out when you went there?

A. Yes, sir.

Q. In '93 while you were there, did you use what water there was in the creek that came down to you?

A. I did, I used what water I could get.

Q. And you say the ditch was already constructed there?

A. Yes, sir.

Q. Could you tell whether water had been used on your land in '92 or not?

A. Yes, sir.

Q. Do you know whether it had or not?

A. Yes, sir, it had.

Q. How far is it from your place down to Morris' place by following the creek?

A. It's fifteen miles straight down the road; it's really more than fifteen, it's sixteen miles.

362 Q. But if you should follow the creek as the stream flows, how far would it be?

A. The creek runs in a roundabout way; the channel of the creek is naturally awfully crooked, so it would run at least twice as far going down the creek as it would direct.

Q. You would say then not less than thirty miles?

A. Not less than thirty miles, I don't think.

Q. And what is the character of the creek bottom?

By Mr. McCONNELL: We object to that as not cross-examination.

A. Down in about the mouth of Piney the creek runs over gravel-bars there for a little ways and it's a sandy shale rock country down there.

Q. What becomes of the water there?

A. The water sinks.

Q. Does a sufficient amount of water pass over these gravel bars for irrigating purposes?

A. No, sir.

Q. It does not?

A. It does in the spring months, but later on when the creek gets low, why then it doesn't.

Q. It does not?

A. No, sir.

Q. About what time do you quit irrigating up there in that country and shut off your headgate?

A. In the fall?

Q. Yes.

363 A. Why, usually about October, about the first of October.

Q. Then the water is permitted to run down the creek?

A. Well, there is some of us that irrigates later and some of us turns the water down.

Q. You don't keep your ditches running up there all winter, do you?

A. No.

Q. Have you seen the creek in the fall when all the ditches were shut off?

A. Well, yes, I have.

Q. State whether or not this water would reach Morris' place in the fall of the year when all the ditches were shut off?

A. Well, it runs over on the flat up there.

Q. It runs over on the flat?

A. Yes, it runs over on the flats and freezes.

Q. State whether or not the water reaches Morris' place after all

the ditches are shut off or whether it seeps through these gravel beds you speak of?

A. I never saw it when it reached Morris' place in the fall of the year.

Q. You never did?

A. No, sir.

Q. You say you had not turned down any water to Mr. Morris and Howell; why is it you didn't turn it down?

364 A. I didn't think it would do any good; I didn't think it would reach them. They never called for water during high water, and when they called for water there was so little water in the creek that it would not reach them anyway to do any good.

Q. And can you say as to whether you ever at any time recognized their right to the waters of Sage Creek?

A. No, sir, I never did.

Q. And why did you never acknowledge their right in the stream; did you believe they had a water right in the stream?

A. Well, I didn't believe under the circumstances that they had a right.

Q. State whether or not since you have been there on the creek you have used the waters at all times during the irrigating season?

A. Yes, sir, whenever I could get it; there was times when it was so low that other parties took it.

Q. Above you?

A. Yes, sir.

Q. But whenever any water came to your headgate you took it?

A. Yes, sir.

Q. And continued that continuously ever since you settled there?

A. Yes, sir.

Q. Has anybody interrupted you in the use of this, the plaintiff or intervenor, Mr. Howell?

A. No, sir.

365 Q. Not interfered with you?

A. No, sir.

Q. As I understand you to say, when you are using the water there you take practically all the water in the creek at your headgate?

A. Yes, sir.

Q. Didn't any go down the creek?

A. No, sir.

By Mr. McCONNELL: Not waiving the right to object to the introduction of this testimony which is not cross-examination, counsel for plaintiff propounds the following questions:

Q. You state that you didn't recognize that either of the plaintiffs, Howell or Morris, had any right to the water, and that was the reason why you didn't turn it down?

A. Yes, sir.

Deposition of T. N. Howell.

T. N. HOWELL, called as a witness on behalf of W. A. Morris, testified as follows:

Direct examination on behalf of W. A. Morris:

Q. Are you acquainted with William A. Morris, the plaintiff in this case?

A. Yes, sir.

Q. How long have you known him?

A. Fall of '78.

Q. Are you acquainted with the lands described in this complaint?

A. Yes, sir.

Q. How long have you known them?

366 A. '78, I went through his field several times.

Q. You mean in '78?

A. No, '88.

Q. Are you acquainted with his ditch through which he takes water out of Sage Creek?

A. Yes, sir.

Q. How long have you known that?

A. That fall was the first, '88, September.

Q. What have you to say as to whether he has used that water since you have known it?

A. Every year; yes, sir.

Q. What use did he apply it to?

A. Raising crops.

Q. On what lands?

A. On this land that he has filed on.

Q. One hundred and sixty acres?

A. Yes, sir.

Q. What character of crops has he raised on that land?

A. He raises good crops when he has water plenty.

Q. What kind?

A. Oats and timothy and alfalfa; he has not raised any oats for five or six years, because he has not had water to raise oats. But in '91-'92, he raised good crops of oats; '93 he raised good crops.

Q. During what period, if any, has he had water enough to raise good crops on his place?

367 By Mr. GODDARD: We object to that *is* incompetent; witness has not shown himself competent to testify from knowledge or as an expert.

A. He raised good crops of all kinds, and grass, until 1894.

Q. Until that time?

A. Yes, up until that time.

Q. How has it been since that time?

A. Hasn't been able to raise any grain; he has been short of water in the fall, couldn't get any water at all late in the season, August and September, no water.

Q. If he had any water after '95, state the amount of it, and if there was any shortage, how much was there?

A. From a good head of water to nothing. Up until June, had plenty of water, and about the first of June, the water began to fall, and by the first of July he is out of water, don't have enough to irrigate with to do any good, and through August and September don't have any, has no stock water.

Q. What distance above his place is the creek dry during these months?

A. Up to near Piney; we call that eight miles.

368 Cross-examination.

(By Mr. PIERSON:)

Q. Mr. Howell, the water raises in the creek-bed just below Mr. Morris' place, does it not?

A. There is a spring, but that don't come to my place.

Q. But then there is a spring there?

A. There is a spring there.

Q. How large is it?

A. It's a small seep, good stock water.

Q. How far is it from Mr. Morris' place?

A. Well, it's two or three miles.

Q. No water between Mr. Morris' place and this point you speak of where this stock water rises?

A. No, sir; only from irrigation; I think this spring comes from irrigation too.

Q. But that stays there during the months of August and September?

A. There's a little water there; there ain't much, though.

Q. Does it flow at all?

A. Oh, it would run down one hundred yards.

Q. It would?

A. Yes.

Q. Sinks in the creek-bed?

A. Yes.

Q. Sinks away in that distance?

A. Evaporates or something.

Q. What's the character of the soil it runs over?

369 A. Its adobe.

Q. Gravel-bed is that?

A. No, seems to be mud, adobe.

Deposition of J. A. King—Direct Examination on Behalf of Plaintiff.

J. A. KING, having been first duly sworn as a witness on behalf of the plaintiff, testified as follows:

Direct examination.

(By Mr. McCONNELL:)

Q. What is your full name, Mr. King?

A. J. A. King.

Q. Where do you reside, Mr. King?

A. I reside—I dont know; I dont reside on any creek, in the valley—the Sage Creek Valley.

Q. How long have you resided there?

A. Since '94, '93.

Q. In Carbon County, Montana?

A. Yes.

Q. That part of Carbon County used to be an Indian Reservation, did it not?

A. Yes, sir; I suppose so.

Q. When was that reservation opened to settlement?

A. In '92.

Q. Did you take up a homestead there yourself?

A. Yes, sir.

Q. Did you take it up in '92 or '93?

A. '93.

370 Q. What time in '93?

A. The fore part of the year, in the spring.

Q. Did you take out any water from Sage Creek?

A. No, sir.

Q. Did you get any water out of it?

A. No, sir.

Q. Did you cultivate your homestead?

A. No, not that year; I didn't take any water out of Sage Creek, at all.

Q. Never done so?

A. No, sir.

Q. Take it out of Piney?

A. Yes, sir.

Q. That's a tributary to Sage Creek?

A. Yes, sir.

Q. That's practically one and the same thing, isn't it?

A. Well, it might be.

Q. How far above the mouth of Piney did you take out your water?

A. Two miles and a half guessing at it.

Q. How much have you appropriated?

A. Two hundred inches.

Q. How large was your ditch?

A. About four feet wide, I judge, at the top; three at the bottom.
Q. What was the fall or grade?

A. A half an inch to the rod—that is, the majority of the distance; a part of it was more.

371 Q. How much of your land have you brought under cultivation through that water?

A. Well, I have it pretty near all under water.

Q. How much did you put in grain?

A. When?

Q. At any one time.

A. Oh, I never put more than a small amount in grain, ten or twelve acres perhaps.

Q. What kind of grain?

A. Wheat, oats and corn, a little is all.

Q. What did you cultivate the balance in?

A. In hay.

Q. What kind of hay?

A. Alfalfa and timothy and wild hay.

Q. How much alfalfa?

A. Thirty acres, about.

Q. And you have raised crops of these hays and grains every year since '93, since you settled there?

A. Yes.

Q. Now, how many persons are there that take water out of Piney besides yourself?

A. Want me to name them?

Q. Yes.

A. J. N. Bean, John Sadring, W. B. Bainbridge, Charles Ingram and C. H. Young is all, I guess.

Q. What amount of water did Bean appropriate?

372 A. I think he appropriated three hundred inches; I never knew exactly, I understood this.

Q. Did he make his appropriation before you made yours?

A. Yes, that is, in one way by filing he was ahead of me, but in turning the water out of the creek into the ditch I was ahead of him.

Q. He filed his record first and commenced taking it out first?

A. No, he filed his record first, but I had a mile and a half of ditch out before he filed.

Q. You didn't file then?

A. No.

Q. Judge Henry decided it and gave Bean priority before you?

A. No.

By Mr. GODDARD: We object to the witness testifying to what the law is.

A. That creek has never been decreed.

Q. Wasn't it taken in with Sage Creek?

A. No.

Q. Can you tell me how much each one of the others on Piney Creek appropriated besides you and Bean?

A. I think that the Sadring ranch had three hundred inches

appropriated. The Young ranch has probably two hundred and fifty inches. I don't know about Bainbridge; he has five cubic feet, I think.

Q. Per second?

A. Yes.

373 Q. That would be two hundred inches?

A. Yes.

Q. There was none of you that appropriated less than two hundred?

A. I think not.

Q. How much water is there in Piney Creek during the month of July ordinarily?

A. Well, now, that varies; in the forepart of the month there is a good deal more than there is in the latter.

Q. Just give the variations of it.

A. There is four hundred inches probably in the forepart of the month and not over two hundred at the end of the month, perhaps not that.

Q. How much have all of you appropriated up there?

A. Something like that.

Q. Something like twelve or fifteen hundred inches?

A. I guess so, I never counted it.

Q. How do you manage for the use of the water among you?

A. Well, it seems the higher up on the creek the better the right.

Q. Well, now, how do you manage, you fellows that are lower down?

A. Well, we take what water comes to us; that's very little for me.

Q. You are low down?

A. No, I got the second ditch.

374 Q. Second ditch from the head?

A. Yes.

Q. Who is ahead of you?

A. Bean.

Q. Bean's rights are better than yours, of course?

A. Yes, so far as position is concerned.

Q. You never had any lawsuit among yourselves on Piney?

A. No.

Q. How do you manage so that each one can have some water?

A. We don't manage; these parties that have the head right, as we call it, get all the water they can use, and we lower down get what we can get; there is no whack-up about it.

Q. When there is only two hundred inches in the creek you don't get any?

A. No, not to speak of.

Q. And when there is four hundred you get how much?

A. Oh, I get probably one hundred inches.

Q. You get all the balance?

A. Yes, I would get a little water out of it.

Q. Don't you know that sometimes you would use it for a couple of days and then turn it down and let your neighbors use it?

A. No.

Q. Would not that be the right thing to do?

A. Yes.

Q. You aim to do what's right?

A. Usually do, yes.

375 Q. Don't right apply to water rights?

A. Yes.

Q. Now leaving Piney you are acquainted with this Sage Creek above the mouth of Piney?

A. Yes.

Q. Give me the names of those who take water out of Sage Creek above Piney?

A. Beginning with the lower ones Beeler, A. P. Graham, W. A. Ealy, Corbett Bennett, Bert Bent, Wallace Bent, T. C. Graham, Michael Wrote, Tom Rule, and Crosby takes water out too sometimes.

Q. Now, how many take water out of Sage Creek in Montana below the mouth of Piney Creek?

A. There is one fellow about half a mile below the mouth of Piney.

Q. How far is it from the mouth of Piney to the State line?

A. About six miles I think.

Q. Who is the man that gets it?

A. Adams.

Q. When did he come in there?

A. He has been in there three years.

Q. When did he commence taking water out?

A. He commenced this spring, and that's all he has done, he just commenced; his dam goes out every night.

Q. Where does the railroad get its water, what point?

376 A. You mean what location on the creek?

Q. Yes.

A. I don't know hardly how to describe it; it's on the reservation.

Q. Is it out of Sage Creek.

A. Oh, yes.

Q. Who sold the railroad company the water?

By Mr. GODDARD: We object to that on the ground that it's not the best evidence.

Q. Michael Wrote.

A. No.

Q. Wallace Bent?

A. Yes, sir.

Q. You don't know by what authority he sold that water?

A. No.

Q. Are you acquainted with the ranch of Mr. Morris the plaintiff?

A. Not very well.

Q. You know he has a ranch in Wyoming?

A. Yes.

Q. Are you acquainted with his ditch?

A. No. I have crossed his ditch, I have seen it.

Q. You knew it was there before you appropriated up in Piney, didn't you?

A. No, I didn't know it.

Q. You didn't know it then?

A. No.

Q. You learned it afterwards?

A. Yes.

Q. You learned he didn't have any water since you people have been taking it up there?

A. He says he hasn't; I haven't been there.

Q. Did he ever ask you for water?

377 A. I don't think he did.

Q. Tell you he was out of water?

A. I don't remember that he ever did.

Q. Told you that you were using the water?

A. I don't remember that he ever spoke to me about it.

Q. And that if you would let it go it would come down to him?

A. No, I don't think Mr. Morris ever spoke to me about water.

Q. Now, Mr. King, you knew at the time you made that appropriation that Mr. Howell and Mr. Morris were using water down across the line?

A. I did not.

Q. How soon after did you learn it?

A. I couldn't say just how soon; I learned it, though.

Q. You have known it a great many years?

A. Yes, I have known that Mr. Morris has a ditch; I don't know that Mr. Howell has a ditch, I never saw it.

Q. But you heard it?

A. Yes.

Q. It's an understanding between all you users of water in Montana that these Wyoming men don't get water since you have been using it?

A. Yes.

378 Q. And that they can't raise crops because you have got the water?

By Mr. GODDARD: We object to that as incompetent and argumentative.

A. Yes.

Q. Were you a party to that suit in the Federal Court at Helena?

A. No, sir.

Q. This is the first time you have been sued?

A. I think I have been sued a time or two before this; I have had papers served on me about twice a year anyhow.

Q. You still go on using the water notwithstanding?

A. Yes, when I get it.

Q. When Bean will let you have it?

A. Yes.

Q. Where is Bean? I would like to see him.

A. I don't know where he is.

Cross-examination.

(By Mr. GODDARD:)

Q. Did Howell ever demand of you to allow the water to run down Piney?

A. No, sir, I was not acquainted with Mr. Howell until now.

Q. Now, you have had some difficulty in getting water yourself haven't you, every year?

A. Yes, sir.

379 Q. You have lost crops on account of not having water?

A. Yes, sir.

Q. Every year?

A. Except one year.

Q. What year was that?

A. The year of '99, I judge.

Q. What was the occasion of your getting water that year?

A. Had more snow in the mountains.

Q. Bean couldn't use it all?

A. I guess not.

Q. Have you got any water since they had a Commissioner on that creek appointed by the Court?

A. Yes, but then that Commissioner has nothing to do with my creek.

Q. Get any water this year in July?

A. Yes, I got water until about the middle of July; of course I didn't get much in July, but had a little until about the middle.

Q. Get any since the middle of July?

A. No.

Q. How much water is there in the creek above you?

A. I don't think there is any over two hundred inches, if that much.

Q. Where does that go to?

A. It goes to ranches, Sadring ranch and the Bean ranch.

380 Q. They both above you?

A. Yes, in one sense; my ditch and the Sadring ditch is the same ditch for a mile or a mile and a half.

Q. And Sadring takes all the water does he?

A. Yes, he lives one *year* nearer the headgate than I do.

Q. He has a headgate in the ditch that you own together at the point where he diverts it?

A. No, just dams it.

Q. Just throws in a dam and takes it all out into his ditch?

A. Yes, sir.

Q. Have you been able to raise any crops without water there?

A. I never have attempted to raise any without water except wild hay; I might raise a little wild hay without water, native hay.

Q. You have not had water either year sufficient to mature your crops have you?

A. Yes, I guess you might say I have up to the first of July; it would mature the first crop of alfalfa and grain.

Q. What about the second crop of alfalfa?

A. It's just like Mr. Morris'.

Q. It's dead?

A. Oh I know I got off well if I got half a crop.

Q. Did you ever get a third crop?

381 A. No, I wouldn't if I had water there that time in the year.

Q. Too far up the mountains?

A. Yes.

Q. Then you have used the water there ever since 1893?

A. '94.

Q. You have used it every year without any objection, so far as you know, from either Howell or Morris?

A. Yes, so far as coming to me and making an objection.

Redirect examination.

(By Mr. McCONNELL:)

Q. Now, Mr. King, you say that neither Mr. Howell nor Mr. Morris came and asked you for water; if they had, you would not have allowed it to flow down to them would you?

A. Why I expect I would.

Q. Now, you say you expect you would; what would you have said about it if they had?

A. One reason that makes me believe it, they were in the neighborhood—I was not at home—and asked for water, and I took it to myself to go to Mr. Bean and others after they had been there and proposed that we turn the water down; I guess that's when Mr. Bean turned it loose for half a day.

Q. He said he would turn it loose for half a day?

382 A. He didn't say how long he would turn it loose, but I understood he turned it loose for half a day.

Q. Did you ever turn it loose any more?

A. No, I never did.

Q. Don't you deny the right of these men in Wyoming to use this water?

A. No, I never did.

Q. Admit they are entitled to it now?

A. If they can get it, yes.

By Mr. GODDARD: We object to that as calling for a legal opinion.

Q. Did you ever know Mr. Bean to turn the water down to them before the one time of one-half day?

A. No.

Q. Never any more?

A. No, I don't know of it.

Q. Did you learn of repeated demands on their part after that for water?

A. To who?

Q. To you people, all you men on that creek?

A. Yes, I heard of it to certain ones but not to me.

Q. You were using water at the time?

A. I don't know whether I was or not.

Q. All these appropriators on Sage Creek in Montana made their appropriations in '92 or later?

A. Yes.

Q. They are all younger than the appropriations Morris and Howell?

383 By Mr. GODDARD: We object to that as calling for a conclusion of the witness and argumentative.

A. I couldn't say; I don't know when they appropriated.

Q. Now, commence at the head of Sage Creek and come down giving the names of each party that's claiming water from the creek using it or claiming it.

A. Well, George Crosby has the highest ditch.

Q. Who is his predecessor?

A. Erickson and Erickson succeeded Zachary. There has a ranch been settled above, clear above, by Antonio Garcia; he isn't succeeded though in this. James A. Pauley and Thomas Rule; he was the successor to Nellie Bowler, successor to John Bowler. Delaph Thorhmalen, T. C. Graham and Mike Wrote is above him but his ditch comes out above. C. M. Brown, Frank Banderhoff, Wallace Bent successor to Frank Shields and he is successor to John Widman Bert Bent, he is successor to Abe Huntley. Corbett Bennett, successor to Halstead, and Halstead is successor to Joe Graham. And W. A. Ealy and A. P. Graham, successor to Christopher Columbus Zachary, and Zachary is successor to John Haggard. L. O. Diltz C. R. Beeler, Charles Runyan and A. W. Adams; and the Burlington Railroad Company, successor to Wallace Bent; and Jack

384 Frost, an Indian. That's all on Sage Creek; now you want Piney?

Q. Yes, we want Piney.

A. J. N. Bean, beginning at the head, and John E. Sadring, successor to A. B. Graham; J. A. King and W. B. Bainbridge, he is successor to A. P. Graham; C. H. Young, successor to W. D. Story and he is successor to John Miner; Charles Ingram and William Sholtz.

Deposition of Albert H. Martin on Behalf of Defendants.

ALBERT H. MARTIN, a witness called and sworn on behalf of the defendants, examined in chief by Mr. GODDARD, testified as follows:

Direct examination by Mr. Goddard:

Q. State your name.

A. Albert H. Martin.

Q. Where do you reside?

A. Musselshell Postoffice.

Q. How long have you lived in Montana?

A. Since 1882. That is, off and on; there are times I have been out of the State in Wyoming or Dakota.

Q. Are you acquainted with Sage Creek and the country in that vicinity?

A. Yes, sir, I used to live there and am very well acquainted there.

385 Q. What years were you there?

A. I first went there in 1887 and stayed there until 1893.

Q. What were you doing?

A. Working as a cowboy.

Q. Where were you working?

A. I was working all through that part of the country in the Big Horn Basin and over on through here to Huntley.

Q. State if your employment on the range took you over this Sage Creek country there during those years?

A. Yes, sir.

Q. How frequently during each year from '89 to '03 did you see Sage Creek?

A. Well, I was on Sage Creek mostly in '89, I couldn't say exactly how many times.

Q. Were you there in the month of July or August, '89?

A. As near as I can recollect, it was about August or September, along about September, if I remember right.

Q. Do you know where William A. Morris' ranch is?

A. Yes, sir.

Q. State if you noticed the state of the water in Sage Creek at or above his ranch there in '89.

A. Yes, I did; I noticed that the water was very scarce there.

386 Q. Do you know whether he was irrigating his land at the time from Sage Creek?

A. I couldn't say; I wouldn't think that he was.

Q. Why?

A. It didn't look like there was water enough there to irrigate.

Q. And were you up the stream further than that at any time?

A. Yes, sir.

Q. What was the stage of the water above?

A. Well, the water was quite scarce until you got close to the mouth of Piney and there was considerable in Piney; I know that we watered the beef there on Piney.

Q. Did you gather beef on the round-up there that fall?

A. Well, I gathered in below there in the Stinkingwater country, up and down the Stinkingwater, through that country, and in fact I didn't come up on Sage Creek at all only as we crossed the Sage Creek.

Q. You were bringing your cattle to Billings?

A. To Huntley.

Q. That's on the Northern Pacific ten miles east of Billings?

A. Yes, sir, or thereabouts.

Q. And when you were bringing these beeves in you crossed Sage Creek?

A. Yes, sir.

Q. At what point?

387 A. I was off the herd that morning I remember very well, and we crossed with the wagon right there at Mr. Morris' place and they come above with the beef.

Q. What difficulty, if any, did you have in finding water for the cattle in Sage Creek?

A. Well, we had just this difficulty; we didn't find water enough; there wasn't water sufficient to water the cattle, so we threw them above.

Q. How far above?

A. We threw them in about the mouth of Piney and from there on up.

Q. How much water was there in the creek where the ford crossed the road?

A. As near as I remember, there was scarcely any; there was a very little possibly.

Q. Wasn't it running at all?

A. No, if I remember right the creek was not running.

Q. What water there was there was in holes as I understand you?

A. Yes, as near as I could describe it now; that's been quite a while ago.

Q. Have you been there since '89?

A. No, sir, I haven't been there since '89, that is on Sage Creek particularly.

Q. Were you there prior to '89?

388 A. We worked there in the head of Sage Creek in 1886 but I don't remember, it was late in the fall and I don't remember much about that.

Q. You were not down as far as the Morris place that time?

A. No, we went right down close to it; I was working for Mr. Nelson Story at that time.

Q. Do you recollect the stage of the water down about the Morris place that year?

A. No, I don't; we camped that year on Piney.

Cross-examination.

(By Mr. McCONNELL:)

Q. Mr. Martin, do you remember that the year '89 was an extremely dry year all over this country?

A. I couldn't say that I remember that it was extremely dry; we had considerable rain in that portion of the country.

Q. Don't you know there was a very light fall of snow in the mountains in the winter of '88 and '89?

A. Now, I couldn't tell you about the snow.

Q. And that the year 1889 was unprecedentedly dry?

A. Well, we had frequent rains there in the basin during that year.

Q. Were those rains enough to raise the streams any?

389 A. Well, at times they would raise the streams; at other times of course it would be just a little rain, a very light rain.

Q. When they were hard enough to raise the streams it was just for a few hours, was it not?

A. It was not for a very long time.

Q. August and September are usually very dry months, are they not?

A. Yes, sir.

Q. Scarcely ever any rain in those months in this region?

A. Well, no, there is not very much rain in August, and September as near as I can explain it, September as a rule is a pretty rainy month.

Q. Do you recollect the summer of '88 there were very extensive forest fires all over this land, and the smoke was very heavy?

A. Well, now, I don't remember about that but I recollect of a fire; there was heavy fires in the mountains but I don't recollect now what year that was in.

Q. Do you remember that the year succeeding these heavy fires and consequent smoke was a very dry year?

A. I recollect very well that the summer of '86 was a very dry year.

Q. Well, I am asking about '89, the year that succeeded that smoke.

390 A. Well, now, as near as I can recollect, it was an average wet season, that is, it was not wet and it was not dry; as near as I can describe it it was a fair season; that's as near as I can tell.

Q. There was a year about that time that was extremely dry was there not?

A. Of course, the dry year, as we all recollect, was 1886, and a hard winter followed.

Q. But there was a very hard winter in the year of '86 and '87?

A. Yes, sir.

Q. And then there was a great deal of rain in the spring and summer of '87; do you recollect that the railroad bridges washed away?

A. There was rains for a short time and then it dried and then the grass was very poor.

Q. In '87?

A. Yes.

Q. Where was that?

A. In the Big Horn Basin.

Q. Do you know how it was in Montana throughout the central regions?

A. As I understand it, in portions of Montana it was quite dry here.

Q. In 1887?

A. '87 there was portions that the feed was very good.

391 Q. I will ask you if after that hard winter of '86 and '87, that the following year after '87 was not a rather dry year?

A. The spring of '88 was an awfully wet season in our country.

Q. Don't you know that '89 was worse than '88?

A. In what way?

Q. Why for want of moisture, want of rain and snow?

A. The spring of '88 was very wet there in that country. Why I recollect so well I had fourteen days' rest coming up.

Q. But you won't undertake to say it was rainy in August and September, '89?

A. Yes, it was rainy, if I remember right. Now, I don't re-

member the different rains that we had in '89, but I know it rained more or less during that season, and am very positive about '88.

Redirect examination.

(By Mr. GODDARD:)

Q. Mr. Martin, Sage Creek and Pryor Creek and Piney rise in the Pryor Mountains, don't they?

A. Yes, as near as I can describe it.

Q. And don't the snow go off the Pryor Mountains by the first of June every year?

A. These Pryor Mountains are not overly high and the snow goes off early.

392 Q. I mean the portion of the mountains where these streams rise?

A. Yes, I don't recollect seeing snow after June or July.

By consent of all parties the taking of this testimony is continued to September 12th, 1904.

Deposition of Frank Medhurst on Behalf of Certain Answering Defendants.

DECEMBER 21ST, 1904.

FRANK MEDHURST, a witness called and duly sworn on behalf of certain of the answering defendants, upon examination in chief by Mr. Pierson testified:

Direct examination by Mr. PIERSON:

Q. Mr. Medhurst, where do you reside?

A. Fromberg is my postoffice.

Q. Carbon County, Montana?

A. Carbon County, Montana.

Q. How long have you resided in the State of Montana?

A. You might say ever since '82.

Q. And what is your business?

A. It's principally farming, ranching.

Q. Are you acquainted with the Jack Morris ranch?

A. Yes, sir.

Q. The William A. Morris ranch I should say?

393 A. Yes, sir.

Q. How long have you known that place?

A. Ever since the fall of '83, I see the place first.

Q. How long has it been since you have known Sage Creek?

A. Well, the same time, the fall of '83.

Q. And state whether or not you ever located this Morris ranch?

A. I settled on the Morris ranch the spring of '84.

Q. And how long did you remain on the ranch?

A. From the spring of '84 until the 6th day of July, '85.

Q. You left the place at this time?

A. Yes, sir.

Q. Now, at the time you left on July 6th, 1885, what was the condition of the water in Sage Creek at the Morris place?

A. The water was getting pretty low.

Q. Well, how much water would there be or was there on July 6th, '85?

A. Well, we had a little piece of ground in there on what is known as Jack Morris' place now, and we could run about ten or fifteen inches of water down there, not over that.

Q. And how many acres of ground were you able to irrigate at that time?

394 A. I had in about three acres.

Q. Were you able to irrigate any more?

A. No, sir.

Q. Well, Mr. Medhurst, how did the water you speak of in '85 compare in quantity with the water in '84?

A. Well, I left there a little before the lowest stage in '85, and in '84 it was still lower.

Q. And when you saw it in '83 how did the water compare in quantity in '83 with what it was in '84 and '85?

A. About the same.

Q. Mr. Medhurst, have you visited Sage Creek and the Morris place since 1885?

A. Yes, sir.

Q. What time?

A. Two years ago.

Q. Two years ago?

A. Yes, sir.

Q. And what was the condition of the water in the creek when you visited it two years ago?

A. Down at the Morris place there was no water at all.

Q. None whatever?

A. No, sir.

Q. It was dry?

A. Yes, sir.

Q. You say you are acquainted with Sage Creek?

A. Yes, sir.

Q. What can you say as to its being a comparatively straight stream or a crooked stream?

A. It's crooked.

Q. Is it a fast or slow stream?

A. Slow.

395 Q. What is the formation of the bed over which the water flows above Morris' place?

A. Gravel and quicksand.

Q. And what effect does that kind of soil have on the water which is flowing over it?

A. Why it would sink.

Q. State whether or not, Mr. Medhurst, the water flowing down Sage Creek does sink in these beds of quicksand and gravel.

A. Yes, sir; it does.

Q. And does it rise again?

A. No, sir.

Q. Well, between the mouth of Piney and the Morris place are there any streams feeding Sage Creek?

A. Yes, sir; one.

Q. What is it?

A. Piney.

Q. Well, I say below the mouth of Piney?

A. Yes, sir.

Cross-examination.

(By Mr. McCONNELL:)

Q. You say you lived on this place in '83?

A. No, sir; not in '83; '84 and '85.

Q. You have been acquainted with it though since '83?

A. Yes, sir.

Q. What time in '83?

A. Fall of '83.

Q. Can you recollect the month?

A. November.

Q. At that time was there any water in the creek?

396 A. Yes, sir; where we crossed it up above.

Q. That was at the ranch?

A. No, sir; that was way up.

Q. Was there any water in the creek at the ranch?

A. Yes, sir; there was a little.

Q. Now you located this in the spring of '84?

A. Yes, sir.

Q. By that you mean that you settled upon it?

A. That I settled upon it; yes, sir.

Q. Did you file on it?

A. No, sir.

Q. Just squatted on it?

A. It was unsurveyed land.

Q. Did you cultivate any land that year?

A. Not the year of '84.

Q. You didn't break any land at all?

A. No, sir.

Q. Just put up a cabin and squatted there?

A. Yes, sir.

Q. What did you do?

A. Run a road-ranch.

Q. Oh, you kept a hotel?

A. Yes, sir.

Q. That's the extent of the use you made of this ranch in '84?

A. Yes, sir.

Q. There was plenty of water there in '84?

A. Yes, sir; in the spring when the snow was melting.

Q. What month in the spring was it you settled there?

A. April.

397 Q. You stayed there continuously then, until July, '85?

A. Yes, sir.

- Q. And ran the hotel?
- A. Yes, sir.
- Q. You didn't pretend to cultivate the ranch?
- A. Cultivated some in '85.
- Q. Except the garden patch?
- A. The garden patch and a little we had in oats and timothy.
- Q. That was in '85; what time did you plant that timothy patch?
- A. In the spring as quick as I——
- Q. Could get it in?
- A. Yes, sir.
- Q. Had plenty of water then?
- A. Had plenty of water in the spring.
- Q. What time did the water begin to fall?
- A. The water began to fall the 20th of June, began to go down.
- Q. About the 20th of June?
- A. Yes, sir.
- Q. There was good water up to that time to irrigate with?
- A. Good water up to that time.
- Q. How much water was there in the spring up to that time?
- A. I couldn't say just how much there was; there was a fair head of water.
- Q. Enough to irrigate a hundred acres?
- A. I don't know; probably there was.
- Q. Have you had experience in irrigating?
- 398 A. I have irrigated a good deal, yes sir.
- Q. What time did the water begin to go down in '84?
- A. '84 it was very low about the 20th of July (June).
- Q. But what time did it begin to decline?
- A. Oh, it began to decline about the same as it did in '85, in June.
- Q. But it gradually declined, is that so?
- A. Went down pretty fast as soon as the snow went off.
- Q. I will ask you if it is not a fact that the amount of water that there is in the irrigating season depends upon the precipitation of moisture during the season?
- A. Yes, sir.
- Q. Some seasons when it rains there is more water?
- A. Yes, sir.
- Q. And some seasons when it is dry there is less water. Is that the case?
- A. Yes, sir.
- Q. Where do you live now?
- A. I live on Blue Water, Carbon County.
- Q. Are you acquainted with these defendants that are taking water out of that Sage Creek in Montana?
- A. Yes, sir.
- Q. How many of them do you know?
- A. I know the two Mr. Bents, and I know Mr. Bean, is all that I can say I know.
- 399 Q. Which one of these gentlemen has called you here as a witness?

A. Mr. Bent.

Q. Are you interested in any way in this controversy?

A. No, sir.

Q. Have you been at any time?

A. No, sir.

Q. You have not been an appropriator yourself of the water in Montana of Sage Creek?

A. I took it out in Wyoming.

Q. You have not been interested as an appropriator then of water out of Sage Creek in this state?

A. No, sir.

Q. During high water in Sage Creek the water runs pretty rapidly, doesn't it?

A. Not very.

Q. Do you know what the fall is for say fifteen miles above the Morris ranch?

A. No, I do not.

Deposition of F. W. Hine on Behalf of Certain Answering Defendants.

F. W. HINE, a witness called and duly sworn on behalf of certain of the answering defendants, upon examination by Mr. PIERSON, testified:

Direct examination by Mr. PIERSON:

Q. Where do you reside, Mr. Hine?

A. In Carbon County, Montana.

Q. How long have you resided in Carbon County?

A. It will be ten years next spring.

Q. What is your business?

400 A. Surveyor and engineer, County Surveyor of Carbon County.

Q. You now hold the position of surveyor of Carbon County?

A. Yes, sir.

Q. How long have you held that position?

A. I have held the position four years.

Q. Are you acquainted with the measurement of water?

A. Yes, sir.

Q. Acquainted with the surveying of ditches?

A. Yes, sir.

Q. As well as acquainted with the Government surveys and the surveying of land?

A. Yes, sir.

Q. Mr. Hine, do you remember of making a visit to Mr. Morris' place about two years ago or thereabouts?

A. Yes, sir.

Q. Fix the time that you were there, the month, if you can.

A. Well, I can tell the month, but I couldn't recollect the date we was running a road survey.

Q. Well never mind about that; state the month.

A. It was in August.

Q. Now, what year?

A. That would be 1902?

Q. Now, state whether or not this is the time Mr. Medhurst was speaking of; did you visit this place with him?

A. Yes, sir.

401 Q. And what was the condition of the water in Sage Creek at this time?

A. The creek was dry.

Q. Whereabouts in reference to the Morris place?

Q. Well, from the mouth of Piney, the creek was dry from Piney to Morris' place.

Q. Mr. Hine, have you visited the Morris place since this date you mention in August?

A. Yes, sir.

Q. When did you visit there?

A. Last September, the forepart.

Q. The forepart?

A. The forepart of September; might have been the middle of September.

Q. What year, this last year?

A. 1904.

Q. At this time, Mr. Hine, state whether or not you made a survey of Mr. Morris' place.

A. Yes, sir.

Q. Who assisted you in making the survey?

A. Mr. Bean and Mr. Bennett.

Q. State whether or not you made a plat of such survey.

A. Yes, sir.

Q. Of Mr. Morris' land?

A. Yes, sir.

Q. Have you that plat with you?

A. Yes, sir.

Q. You may exhibit it.

(Witness produces plat.)

402 Q. This map shows Sage Creek, or a part of Sage Creek, in Montana and Wyoming?

A. Yes, sir.

Q. It shows the lands of William A. Morris?

A. It shows Mr. Morris' ranch and Mr. Howell's ranch in Montana.

Q. This map is substantially correct is it?

A. Yes, sir.

By Mr. PIERSON: We ask that this map be marked for identification as Defendants' Exhibit "A," and we offer it in evidence as a part of the deposition of F. W. Hine.

(Map marked Defendants' Exhibit "A.")

Q. Mr. Hine, you were furnished with the description of Mr. Morris' land shown in his bill in equity?

A. Yes, sir.

Q. You located the forty-acre tracts as described in his bill of complaint?

A. Yes, sir.

Q. Did you ascertain the number of acres, as described in Mr. Morris's bill of complaint, that he had under ditch?

A. Yes, sir.

Q. How many acres are there under Mr. Morris' ditch?

A. There is twenty-one acres and forty-three rods, without the small garden west of the house; we didn't go down to measure that.

403 Q. How much would there be of that garden under the ditch?

A. Somewhere about an acre of land I suppose, more or less; not very much more, couldn't be.

Q. Then you would say twenty-two——

A. Twenty-two or twenty-three acres.

Q. And what kind of crops were growing on this twenty-two acres?

A. Well, he had a small piece of grain by the house; the other was meadow, timothy.

Q. Any alfalfa?

A. Timothy and alfalfa meadow.

Q. Well, Mr. Hine, did you visit Mr. Howell's place?

A. Yes, sir.

Q. Were you informed as to the description of Mr. Howell's land described in his petition in intervention?

A. Yes, sir.

Q. Did you locate his land?

A. Yes, sir.

Q. And state how many acres of Mr. Howell's land are under the ditch constructed out of Sage Creek.

A. One hundred and ten acres.

Q. Only a hundred and ten?

A. Only a hundred and ten.

Q. Mr. Howell claims two hundred acres; what can you say as to the other ninety acres?

A. Well, he has one eighty and a portion of a forty, one on top of the hills and——

404 Q. Could not be irrigated?

A. No, sir, it would be impossible to get a ditch.

Q. As to Mr. Howell's headgate, did you observe it?

A. Yes, sir.

Q. State what condition you found it in.

A. Well, it was a box two feet wide, five and a half inches deep, covered up with dirt in the creek bank; it was covered over; filled in on top.

Q. And what was the condition of his ditch?

A. Well, the ditch is pretty badly washed in places and filled up.

Q. Mr. Hine, you observed the land on Mr. Howell's place, did you?

A. Yes, sir.

Q. What can you say as to its showing any evidence of cultivation?

A. Nothing more than just where the laterals—the laterals are plowed out, and outside of that there is no evidence of any cultivation being there.

Q. Do the laterals show evidence of carrying water at any time?

A. No, sir, they seem to be just the same as when they were made.

Q. Any indication that the land has ever been plowed other than these laterals you speak of?

By Mr. McCONNELL: We move to strike that out; let him state what the indications are.

Q. State what the appearance of it is.

405 A. The appearance of the land is similar to that above the place, the same as outside of the fence; there isn't any of it that has got any grass on it or anything to show that anything has been raised on it.

Q. Well, what I have reference to, Mr. Hine, is whether the appearance of the soil shows that it has ever been plowed or stirred up with a plow?

A. Well, you can't tell; it doesn't look like it.

Q. What kind of soil is this?

A. It's a gumbo.

Q. What is the particular location of this place as to what kind of land it's located on?

A. It's an old lake-bed, I should judge. The hills run high around it and it slopes to the east and makes it a lake-bed like, that the water couldn't get out of it without it would sink.

Q. What can you say in regard to the soil being a good soil and productive, or poor quality?

A. I would call it a poor quality.

Q. Would you say it was productive or not?

A. No, sir, I don't think it is.

Q. In your opinion it would not be productive of agricultural crops?

A. No, sir.

By Mr. McCONNELL: That question is leading and we except to it on that ground and move to strike out the answer for that reason.

406 Q. Mr. Hine, are you acquainted with the location of Mr. Wallace Bent's ranch in Montana?

A. Yes, sir.

Q. He is one of the defendants in this case?

A. Yes, sir.

Q. How far is it from Mr. Wallace Bent's ranch to the head of Sage Creek?

A. Following the creek, I should judge it's about eighteen miles.

Q. And how far is it from Bent's place, as the creek runs, down to Mr. William Morris' place in Wyoming?

A. Following the bed of the creek, the channel of the creek, it

would probably be forty miles, following the channel of the creek the way the creek runs.

Q. And Mr. Hine you observed the character of the creek-bed of Sage Creek?

A. Yes, sir.

Q. What can you say as to the character of the bed, the formation of the soil?

A. Well, it's sand and gravel; quicksand.

Q. And as to the flow of the water in the stream, state whether Sage Creek is a fast stream or a slow stream?

A. It's a slow stream, the water standing in pools there at times only when the water is running.

Q. And state whether it's a comparatively straight stream or crooked?

A. It's very crooked.

407 Q. Well, these conditions, what effect do they have on the water which happens to be running in the stream?

By Mr. McCONNELL: We object to that as calling for an answer that is a matter of natural deduction from facts proven, and calling for the opinion of the witness; also irrelevant and immaterial, calling for the conclusion of the witness as to what the facts stated prove and therefore outside the province of the witness.

A. Well, the distance that this water has to travel, the seepage and evaporation of the creek, it would take quite a good head of water to go down that distance, through the summer, or there wouldn't be any water below there.

Q. The seepage and what else?

A. The evaporation.

Q. When you visited the creek last September was there any water flowing in the creek below the mouth of Piney?

A. No, sir.

Cross-examination.

(By Mr. McCONNELL:)

Q. How long have you been engaged in the business of surveying Mr. Hine?

A. I have been engaged here nine years, ten years in the spring in Carbon county.

408 Q. I mean all your life.

A. For the last sixteen years.

Q. What is your age now?

A. I am forty-three.

Q. You were at Morris' place you say in August, 1902?

A. Yes, sir.

Q. Was that the time you made the survey or the last time?

A. Last September we made the survey.

Q. What was the occasion of your going to Morris' ranch in 1892?

A. We were surveying a road down Sage Creek to the Wyoming line and went to the Morris ranch to get water.

- Q. The creek runs through Morris' ranch?
A. Yes, sir.
Q. How many acres in the Morris ranch?
A. It's a hundred and sixty.
Q. Quarter section is it?
A. It's a quarter section of land.
Q. Four forties?
A. Yes, sir.
Q. And it's correctly represented, is it, by that map?
A. Yes, sir.
Q. And the position of the creek correctly located through the land?
A. Yes, sir.
Q. Did you take it by actual survey?
A. Yes, sir, by measurements from the section line, or from the quarter section line.
Q. How does it divide it?
A. The line cuts off nearly through the center of the ranch the creek lays in.
Q. Nearly through the center of the ranch?
A. Starts in at the corner of one forty; his west forty is just by the creek.
Q. And then it runs diagonally across it?
A. Yes, sir.
Q. Nearly to the opposite corner?
A. Nearly to the opposite corner of that row of forties, yes, sir.
Q. That is the form of a parallelogram?
A. It lays in the form of a T, the forties do.
Q. State how the forties that belong to Morris are identified?
A. Well, he has got the east half of the southwest quarter—
A. I don't want the description of it. Did you put these blue marks on this map?
A. Yes, sir.
Q. Then they are identified on the map by blue cross marks?
A. Yes, sir.
Q. How much is the fall of the creek where it enters Morris' land?
A. Well, we didn't take the fall of the creek.
Q. Did you take the fall anywhere near that ranch?
A. Not of the creek, no, sir.
Q. Did you take the fall of the land there?
A. No, sir, we didn't take the fall of the land.
Q. Does the creek slope or have a fall in the direction that the creek runs?
A. Yes, sir.
Q. And you can't say how much?
A. No, sir, I couldn't say how much.
Q. Are there any hills on this land or is it level?
A. It's practically level.
Q. Practically level land?
A. Yes, sir.

Q. Now, would not the amount of land that the ditch would cover depend on how high up the creek it was taken out?

A. Yes, sir.

Q. I will ask you if water can be taken out of the creek high enough up to cover all the Norris ranch?

By Mr. PIERSON: To which we object on the ground that it is irrelevant and immaterial as to what other ditches taken from Sage Creek may do toward irrigating this ground.

A. Yes, sir.

Q. Now, what is the depth of the creek through his land?

A. The depth from the bank to the bottom of the creek?

Q. Yes.

411 A. We didn't measure the depth; it's somewhere from six to eight feet, cut banks.

Q. Cut banks?

A. Yes, sir, the banks are straight up and down through there.

Q. Have you got Morris' headgate, the headgate to his ditch, correctly noted on your map?

A. Yes, sir.

Q. Is it indicated by the words "Morris Headgate"?

A. Yes, sir.

Q. How far is that headgate from the point on the creek where the creek enters Morris' land?

A. I can tell you very near from the map without looking up the notes. (Witness consults map.) About one hundred and twenty rods.

Q. On which side of the creek is the ditch taken out?

A. On the east side.

Q. Looking down the creek which hand would it be?

A. On the left bank.

Q. State whether there is any ditch taken out on the right bank?

A. No, sir, this water is taken out and comes down—there is a small ditch taken out probably a foot wide, six or eight inches deep, it runs down close to the corner of the ranch, right along this point here (illustrating on map).

Q. Mark that letter "A" will you?

(Witness marks as requested.)

412 Q. You say there was a lateral taken out there?

A. The lateral went through the fence at that point.

Q. On which side of the creek was that lateral?

A. It was on the west side just a little ways from the creek bank.

Q. Then there were ditches on both sides of the creek?

A. Yes, sir, a small ditch on the west side.

Q. How large was the main ditch?

A. Well, the main ditch was probably two and a half feet by ten inches deep.

Q. Have you located the main ditch on the map?

A. No, sir, we just located the headgate.

Q. You don't pretend to show on your map then where the ditch ran after it entered Morris' place?

A. No, sir.

Q. Why did you not do that?

A. Well, we could have done that; I have it in my notes of the creek, but it was just neglect; I didn't measure the amount of land under the ditch on Morris' ranch, supposed that would be all that was necessary.

Q. Could laterals be taken out of that ditch and run both ways to and from the creek over Morris' land?

A. No, sir, I don't think so; it would be hard to take a lateral out of that ditch and run it up towards the hill.

Q. You said the ditch ran perfectly level?

A. No, I said it's level land.

Q. But you could take it out of the left side of the ditch, the left hand of the ditch looking down the creek, and carry it further down?

A. By going further up the creek.

Q. Could you not take out a lateral on the left bank of the ditch on Morris' place, and through that lateral carry water so that it would cover other land than is covered by the main ditch?

Mr. PIERSON: To which defendants object for the reason that it's irrelevant and immaterial.

A. You could by taking the fall out of his ditch, raising the ditch a little higher, but that would be the only way; you might make up a little fall.

Q. As you go down you get fall don't you?

A. Yes, but they are supposed to run these ditches as high as possible on a certain grade.

Q. I understand you to say that something less than twenty-five acres all told is all there is on this ranch?

A. Counting the garden would make it about twenty-three acres.

Q. That the ditch would cover?

A. Well, all that is under cultivation now; there is other pieces of land there that never has been broke.

Q. How much of the one hundred and sixty acres all told, cultivated or not cultivated, can be irrigated by this ditch?

By Mr. PIERSON: We object to that on the ground that it's incompetent, irrelevant and immaterial.

A. Well, I didn't make any measurements of land along the creek and the land that had been farmed.

Q. What you mean to be understood then is that all the land that you saw there that to your mind had ever been cultivated, was twenty-three acres?

A. On his homestead there; yes, sir.

Q. You don't pretend to say how much land might have been irrigated by this ditch?

By Mr. PIERSON: To which we object unless it is confined to the one hundred and sixty described in the bill of complaint.

A. I couldn't say as to the amount of land.

Q. What time was the Crow Reservation opened?

A. Well, sir, I don't know the date.

Q. Well, it's been some twelve years ago, has it not, since the Crow Reservation was opened?

A. Yes, sir.

415 Q. Did these defendants settle upon that stream after it was opened?

By Mr. PIERSON: We object to that as immaterial.

A. I don't know myself. I wasn't personally acquainted with them.

Q. These defendants, to your knowledge, have been living upon Sage Creek and using water out of it for how many years?

A. Well, to my knowledge, I have known them about seven or eight years is as long as I have known them.

Q. Now, I will ask you this question: If they have taken out and used all the waters from Sage Creek so that Mr. Morris didn't get any, could you pretend to say, after this lapse of time, that there was no other land upon his place other than you have described, that might have been cultivated had he lots of water?

By Mr. PIERSON: To which we object on the ground that it is argumentative.

A. Why there could have been more irrigating on his place but I think he was doing the most of his irrigating off of his place.

Q. You didn't answer my question. Could you be certain that he did not irrigate other grounds on his place than the
416 twenty-three acres that you have described?

A. Well, it doesn't show that it has ever been irrigated.

Q. What do you mean by saying it has not been irrigated?

A. There is no grass or anything to show it has been irrigated.

Q. How many years will the grass last if it gets no water?

A. Well, it would certainly show better sod than ground that had never been watered.

Q. After six or eight or ten years?

A. Certainly would.

Q. Did you go over all this one hundred and sixty acres and place your two eyes upon every square foot of it to see whether it had been irrigated or not?

A. No, sir, I was on the east side of the creek.

Q. How much of this one hundred and sixty acres did you inspect with reference to the question of whether it had been irrigated?

A. The portion east of the creek; I was pretty well over that.

Q. At the time you say you saw this creek dry, August, 1900, did you see any of these defendants using this water irrigating their places?

417 A. No, sir, I didn't notice them.

Q. Did you go up there to see where the water was, where it had gone to?

- A. No, sir, I didn't notice; I was on county work.
- Q. It was merely an incident that you saw it at all?
- A. I know because we suffered pretty badly for water down there.
- Q. At the time you were there in September, 1904, you went there to do this work?
- A. Yes, sir.
- Q. In the employment of these defendants?
- A. Yes, sir.
- Q. Now, I understand you to say that about one hundred and ten acres of Howell's place was under irrigation and cultivation?
- A. No, sir, that could be irrigated.
- Q. Did you make a survey there to see how much his water would cover?
- A. No, sir, he has a ditch around on about that much of his land.
- Q. Did you survey the area that you say the ditch covers?
- A. Yes, sir, we went over that portion and took notes of the land.
- Q. Is your statement of one hundred and ten acres the result of a survey or a mere estimate?
- A. That was surveyed through as the lines crossed; the portion that lays on top of the hill is the portion we are wanting that can't be irrigated.
- Q. What do you mean by saying surveyed through?
- A. We followed his fence, where he has his present fence.
- Q. And by surveyed through you mean you followed his fence?
- A. We followed his fence.
- Q. Now, how could you tell the number of acres that were covered by the ditch by following the fence.
- A. Because the ditch followed the fence, his ditch that run around the east side.
- Q. Do you mean to say then that you followed the ditch instead of the fence?
- A. The ditch followed the fence and we followed the fence.
- Q. The ditch followed the fence and you followed the fence?
- A. Yes, sir.
- Q. Why didn't you follow the ditch?
- A. We wanted to get the land he had under the fence.
- Q. You didn't want to get the land he had under the ditch?
- A. Yes, sir, we also took that.
- Q. Well, did the fence and the ditch accompany each other clear around the land?
- A. Well, practically, yes.
- Q. Do I understand you to say that you commenced at a given point where you found the ditch and fence together and followed them around to the point of beginning?
- A. Yes, sir.
- Q. Then the ditch runs in a circle around this area?
- A. The ditches run in a circle and come together on the east side of the ranch at the foot of a hill.
- Q. Is it one ditch or two ditches?
- A. Two ditches coming in and meeting at the east end of the ranch.

Q. Now, what part of this area did the one ditch circumnavigate and what part did the other?

A. Well, he has a ditch on the land there that doesn't belong to the land that he claims; it takes in quite a lot of land, it covers quite a lot of land, but not the land that he claims. In locating the corners of his land claimed we found that he has more land under that that doesn't belong to him than he has that does.

Q. Now, that's your answer to my question?

A. Yes, sir.

Q. Don't you know that that land of Mr. Howell's is exceedingly productive?

A. No, sir.

420 Q. You don't?

A. No, sir.

Q. Did you ever see a crop growing on it?

A. No, sir; I have seen him try to raise crops on ground similar.

Q. Did you ever raise any crops on it yourself?

A. Yes, sir.

Q. Then your skill as a surveyor enables you to tell exactly whether the productiveness of any given land is when you lay your eye on it?

A. Well, in land of that character I have had some experience.

Q. If the fact is that very fine crops have been raised upon that land, that would be better proof of its productiveness than your opinion?

By Mr. PIERSON: To which we object on the ground that it is irrelevant as well as argumentative.

A. Well, it might be if there ever was crops raised there.

Q. I will ask you if Howell's ditches did not show that they had not been used for several years?

A. Yes, sir, they had not been used—of course, I couldn't say how long; they didn't look like they had been used lately.

Q. I will ask you if the land don't show that it had not been cultivated for several years?

421 A. Yes, sir; it's been several years; if it has been cultivated, it does not show that it's been cultivated by going over it.

Q. I understand you to say then that the indications are that it has not been cultivated for several years?

A. Yes, sir, that it has not been.

Q. In your estimate of the length of Sage Creek, with its windings, from its head to the Morris place, did you have any basis upon which to base that estimate?

By Mr. PIERSON: To which we object for the reason that it assumes a fact which the witness has not testified to; he made an answer giving the distance from the head of Sage Creek to Morris place.

A. From the head of Sage Creek to Morris' place, according to the length it would be about fifty-eight miles.

Q. I will ask you if you didn't state in your original examination

Q. That it was about eighteen miles from the head of Sage Creek to Wallace Bent's place?

A. Yes, sir.

Q. What was it that you said was forty miles from Morris' place?

A. Along the channel of the creek.

Q. From where?

A. From Wallace Bent's place.

Q. And not from the head of the creek?

A. No, sir.

Q. That's mere guesswork on your part?

A. No, sir, not altogether.

Q. Did you measure any portion of it?

A. We measured the distance through by sections.

Q. And what was the distance through by sections?

A. Following the section lines probably on a straight course twenty-two miles, following a straight course without the angles of the creek.

Q. Now, you spoke about the creek-bed being gravel and sandy; do you know how deep it is to bed-rock through these gravel-bars?

A. No, sir.

Q. Isn't it the case that all these streams in that locality and elsewhere in your observation that have these sandy gravel beds, that the water sinks at some places and rises again lower down?

A. Not always.

Q. That depends upon the situation of the bedrock?

A. Yes, sir.

Q. The water sinks through these sandy places to the bedrock and then follows that down?

A. Well, it would be supposed to strike the bedrock and of course it would be hard to tell where it would go.

Q. It would follow the bedrock?

A. Yes, sir.

Q. You don't pretend to say then what becomes of this water when it sinks in these bars?

A. No, sir.

Q. Are there any springs along that creek?

A. Well, that may be from seepage water and it may not.

Q. Tell me first whether there are or not.

A. There are very few towards the head of the creek from Bent's on up.

Q. I am talking about from Morris' up.

A. None that I know of.

Redirect examination.

(By Mr. PIERSON:)

Q. Mr. Hine, confining yourself to the one hundred and sixty acres of land which Mr. Morris has described in his complaint, now did I understand you to state on cross-examination that you did not know whether any more land could be covered by his present ditch?

By Mr. McCONNELL: We object to that upon the ground that it

is immaterial what counsel understands the witness to have stated; his testimony speaks for itself as to what he did say.

424 A. I don't think that it covers any more land to amount to anything.

Q. Now, state whether or not Mr. Morris could irrigate any more of his hundred and sixty with the ditch which he now has out of Sage Creek on his land?

A. No, sir, I don't think so to amount to anything.

Q. Now, you spoke in cross-examination something about there being two ditches on the Howell place. Do you mean to inform us that Mr. Howell has two ditches out of Sage Creek?

A. No, sir, the main ditch runs down close to his place, then it forks and runs around each side of his place and meets at the east end where the fence is.

Q. Then I understand from that that you mean to tell us he waters the basin by running a ditch around on each side of that; is that the idea?

A. Yes, sir.

Q. Mr. Hine when you were there did you take any pictures of Mr. Howell's improvements?

A. Yes, sir.

Q. Have you those pictures with you?

(Witness produces three pictures.)

425 Q. Are the three pictures which I hold a correct representation of the improvements on the Howell place?

A. They are.

Q. Do they show all of the improvements there?

A. Yes, sir.

By Mr. PIERSON: We ask to have these three pictures marked Defendants' Exhibits "B," "C" and "D," respectively, and offer them in evidence at this time as a part of the deposition of the witness F. W. Hine.

(Exhibits marked as requested.)

Q. These three pictures introduced in evidence are pictures of the same building or buildings?

A. It's pictures of his house and barn.

Q. Represent different views of the same building?

A. Different views of the same buildings.

Q. How many buildings were there?

A. Three.

Q. What do they consist of?

A. House and barn and—supposed to be a chicken-house.

Recross-examination.

(By Mr. McCONNELL:)

426 Q. Under whose instructions did you take these pictures?
A. Well, it was a notion of my own; I had my camera with me.

Q. Under whose instructions did you bring them with you to this taking of depositions?

A. Well, it was the wish of Mr. Bent.

Q. Is it your opinion as a water expert that the water a man gets to irrigate his land depends upon the size of his house?

A. No, sir, but I would judge it would show the improvements on his ranch.

Q. What has that got to do with his water?

A. Well, we didn't find any water.

Q. He don't irrigate his house, does he?

By Mr. PIERSON: We object to that as irrelevant and immaterial.

(By Mr. PIERSON:)

Q. These pictures were taken at the time you made the survey, Mr. Hine?

A. Yes, sir.

(Here follow map and photographs marked pp. 427, 428, and 429.)

431 FRANK MEDHURST recalled.

(Examined by Mr. PIERSON:)

Q. Mr. Medhurst, in '83, '84 and '85 when you were on the Morris place what was the condition of the creek below the Morris place as to whether there was water in it or not?

A. Well, in the spring of the year there was water run down there, but from the 20th of June there was no water got down there at all.

Q. Below Morris'?

A. Yes, sir.

Q. The creek was dry from there to the mouth?

A. Yes, sir.

Deposition of J. N. Bean on Behalf of Answering Defendants.

J. N. BEAN, a witness called and sworn on behalf of the answering defendants, upon examination by Mr. Pierson, testified as follows:

Direct examination by Mr. PIERSON:

Q. Mr. Bean, where do you reside?

A. I reside in Carbon County; Bowler is my postoffice.

Q. On what stream do you reside?

A. On Piney.

Q. How long have you resided on Piney?

A. Since about the 26th day of June, '93.

432 Q. You are one of the defendants in this case?

A. Yes, sir.

Q. What has been your business since you have resided on Piney?

A. I have a ranch there, I am a rancher.

Q. Is the Piney Creek you speak of a tributary to Sage Creek?

A. Yes, sir.

Q. Where does Piney Creek rise?

A. It rises in a spring just above my place.

Q. And where is the head of Piney Creek in reference to the Pryor Mountains?

A. It is on the southwest slope of the Pryor Mountains.

Q. What is the flow of Piney Creek in the spring of the year? State whether or not the flow is increased by melting snow.

A. Yes, sir, it's increased by the melting of the snow in the spring.

Q. And what would be the flow of this stream in the spring of the year?

A. Well, in the spring of the year it flows, oh, five hundred inches of water, possibly more, a little more than that at its highest time, but as soon as the snow is gone it begins to go down gradually, all the water in the stream.

Q. You are acquainted with the measurement of water?

A. Yes, sir.

433 Q. And about what time does this stream fall in quantity?

A. Well, it commences falling something like the first of

June and keeps on falling down, and after the 20th of June there is no more high water.

Q. No more which?

A. No more water.

Q. State whether or not the water of Piney Creek would reach Sage Creek after the 20th of June if it were permitted to flow uninterruptedly.

A. No, sir, it would not.

Q. State whether or not you have experimented with the water to ascertain this fact?

A. Yes, sir, I have.

Q. When?

A. Well, in different times last summer we let the water flow down, not expressly, to see if it would reach Sage Creek, but for other purposes.

Q. Well, state how much water you turned down at that time, or was turned down.

A. Well, it was all turned in the creek.

Q. All turned in?

A. All turned in, yes, sir.

Q. Well, how far did it flow before it sunk into the ground or evaporated?

A. Well, it only went about a mile and a half from my place; it would be possibly, with the meanderings of the creek, it would be something like two miles.

Q. What is the nature of the formation of the creek-bed of Piney?

A. Well, sir, it's a rocky formation.

Q. And what effect does the soil have on the water which passes over it?

A. It sinks very badly in this soil.

Q. I understood you to say you have resided on Piney since 1893?

A. Since 1893, yes, sir.

Q. Well, you are acquainted with where Sage creek heads, are you?

A. Yes, sir.

Q. Where does it head?

A. It heads in Carbon County in the Pryor Mountains.

Q. Now, as to the Pryor Mountains; that is a chain of mountains or a single mountain?

A. Well, its a single mountain, I should judge.

Q. And how was the mountain covered in 1893, Mr. Bean, in reference to timber, and explain how the timber was there in 1893 and how it is at this present time.

A. Well, in '93 there was a great deal of timber on top of the mountain and also on the north side of the mountain on Sage Creek.

Q. And how is it now?

A. Well, sir, there isn't any there to speak of.

Q. Well, what can you say as to the supply of snow-water at this time as compared with 1893?

By Mr. McCONNELL: To which counsel objects, and also makes objection to this line of proof in regard to the condition of Pryor Mountain as to whether it is timbered or not, because its irrelevant and immaterial and sheds no light on this present controversy.

A. Well, the snow goes off a great deal sooner now than it did in 1893.

Q. And as to the supply of water in the creek, state how that would be?

A. Well, the supply is smaller, a great deal smaller than it was in '93; gets smaller every year.

Q. Now, does the snow stay on Pryor Mountain in such quantity as to feed the stream at this present time?

A. It all goes off during the spring; by the first of July there isn't any snow on Pryor Mountain at all to speak of, probably a small patch in the shade some place, but it would be very small.

Q. Mr. Bean, after the first of July we will say how many inches of water is there running in Piney?

A. Well, sir, there is not over, not over thirty or forty inches of water during that time.

436 Q. State whether or not if that was all turned down it would reach Sage Creek.

A. No, sir, it would not.

Q. And state whether or not, Mr. Bean, during the spring when the snow freshet is on there is plenty of water in Piney for everybody.

A. There is, yes, sir.

Q. And state whether or not that flows on down into Sage Creek?

A. It does, yes, sir.

Q. More than the ranchers can use on Piney?

A. Yes, sir.

Q. As to Sage Creek, Mr. Bean, state whether or not there is a freshet or the quantity of water in Sage Creek is affected by the snow freshet in the spring?

A. Early in the spring it is affected a little but not very much; it's not affected like Piney is by the snow going off of the mountains. At the foothills it seems to be affected some by the snow going off, but the top of the mountain doesn't affect Sage Creek any at all to speak of.

Q. Are you acquainted with the amount of water flowing in Sage Creek above the mouth of Piney, say along about June 20th of each year?

A. Well, I never measured the water there but then there is always water flowing through there.

Q. That is up above?

A. Up above the mouth of Piney, yes, sir.

437 Q. Is there always water at the mouth of Piney in Sage Creek?

A. No, not always there isn't, but before June 20th or about June 20th there is water in it.

Q. Coming down Sage Creek?

A. Sage Creek and Piney too, yes, sir.

Q. When does this water cease to flow in Sage Creek proper.

A. It commences to cease along about that time; it begins to get hot then and the water begins to seep and sink and evaporate.

Q. You say about what time?

A. About June 20th.

Q. You are acquainted with where Mr. Bainbridge takes water from Piney Creek?

A. Yes, sir.

Q. How far is it from Mr. Bainbridge's headgate down to the mouth of Piney?

A. It's about two miles and a half.

Q. Mr. Bainbridge is a defendant in this case?

A. Yes, sir.

Q. And Mr. Bean, how far is it from the mouth of Piney down to Mr. Morris' place as the creek runs, following the meanderings of the creek?

A. Well, it must be nearly twenty miles, I should think.

438 Q. You are acquainted with Mr. Wallace Bent's place?

A. Yes, sir.

Q. Following the meandering stream how far is it from Mr. Wallace Bent's place to Morris'?

A. Well, sir, I should judge it is near forty miles taking the meandering of the creek in, you know.

Q. And how far is it from Mr. Morris' place down to Howell's?

A. On the creek?

Q. Yes.

A. I would think it's twelve or fifteen miles.

Q. Twelve or fifteen miles as the creek runs?

A. Yes, sir, as the creek runs.

Q. Mr. Bean you live, and all of these defendants live, in Carbon County?

A. Yes, sir.

Q. Their ranches are located in Carbon County?

A. Yes, sir.

Q. How do you know when that land was thrown open to settlement?

A. Sometime about the first of October in 1893.

Q. Do you know what that land was prior to that time as to whether it was an Indian Reservation or not?

By Mr. McCONNELL: We will stipulate that.

By Mr. PIERSON: You will agree that it is part of an Indian Reservation, will you?

439 By Mr. McCONNELL: Yes.

It is admitted by all the attorneys in this case that the land upon which all of the defendants have settled in Carbon County and the land on which Sage Creek—in fact all of the Sage Creek in Montana is located—was on the Crow Indian Reservation until October, 1892.

Q. What is the nature of Sage Creek, Mr. Bean, as to being a fast or a slow stream?

A. It's slow.

Q. Are you acquainted with the formation of the creek-bed between Wallace Bent's place and Morris'?

A. Yes, sir.

Q. And what can you say as to its formation?

A. Well, sir, there is quicksand and gravel and rock in the bed of the creek, a good many places.

Q. And what effect does it have on the capacity of the stream of water flowing over these places?

A. Water will sink in them.

Q. And as to Sage Creek state whether it is a comparatively straight stream or crooked.

A. Why, it's very crooked.

Q. Mr. Bean did not visit William A. Morris' place last September with the surveyor, Mr. Hine?

A. Yes, sir, I did.

Q. How long have you known the Morris place?

440 A. Since '93, the fall of '93 was the first time I seen it.

Q. Have you been acquainted with the quantity of water in Sage Creek since '93?

A. Yes, sir.

Q. State whether or not water after the 20th of June has reached Mr. Morris' place?

A. No, sir, it never reached Mr. Morris' place after the creek went down, after Piney went down.

Q. Ever since you have known it?

A. Yes, sir.

Q. Was that condition true in 1893?

A. Yes, sir, it was.

Q. State whether or not that condition has been true in each and every season since 1893 up to this present time.

A. My best recollection is that it has been true in every year.

Q. Mr. Bean you noticed the number of acres which Mr. Morris had under his ditch of the one hundred and sixty acres which he has described in his complaint?

A. Yes, sir.

Q. How many acres did he have?

A. I just looked at it and passed my judgment on it and thought it was twenty-five acres.

Q. You are acquainted with the measurement of the land?

A. I am.

441 Q. And what kind of crop was growing on this twenty-five acres?

A. There was timothy and alfalfa on part of it, a little grain and some garden stuff.

Q. Did you notice any other crops growing there?

A. No, sir.

Q. State whether or not this twenty-five acres you say is all the land which Mr. Morris had covered by ditch was on his hundred and sixty.

A. Yes, sir.

Q. You were with the surveyor?

A. I was.

Q. State whether or not you located the corners of Mr. Morris' fence?

A. We did.

Q. Did you visit Mr. Howell's place?

A. Yes, sir.

Q. And how many acres on Mr. Howell's two hundred which is described in his petition were under his ditch?

A. Under his ditch?

Q. Yes.

A. Well, something like a hundred acres; I couldn't measure it exactly with my eye but we run the chain over it.

Q. State whether or not, Mr. Bean, there was any part of Mr. Howell's place which was not under ditch and could not be covered by ditch.

A. Yes, sir, there was an eighty that lay up on a ridge and part of another forty that lay up on this ridge that could not have been covered with his ditch.

442 Q. What is the character of the soil on Howell's place that he has under ditch?

A. The character of the soil is gumbo.

Q. Are you acquainted with the soil out there in that locality and on Sage Creek?

A. Yes, sir.

Q. State as to this soil whether it was productive or otherwise.

A. Well, I don't think it is productive.

Q. Did you notice whether or not, Mr. Bean, this land had been cultivated?

A. I couldn't tell that it had ever been cultivated.

Q. Was there anything to indicate that a crop had ever been sown on it?

A. I didn't see anything only there was some furrows plowed through, but it didn't show that there had been any water in them or had been any crops there.

Q. What are these furrows?

A. They were some laterals plowed through the field.

Cross-examination.

By Mr. McCONNELL:

Q. You wouldn't pretend to say there hadn't been crops raised there?

443 A. No, sir, I wouldn't say there hadn't been.

Q. You don't know how this water was, as to whether it reached these places of Morris and Howell, before you settled in there in '93?

A. No, sir, I don't know anything about it before that.

Q. You settled there in June, '93?

A. Yes, sir.

Q. How many settlers were there in there taking water out of Sage Creek at the time you settled there?

By Mr. PIERSON: We object to that as irrelevant and immaterial.

A. There was eight besides myself.

Q. All taking water out of there?

A. Out of Sage Creek.

Q. And some of them below the mouth of Piney?

A. Yes, sir.

Q. Were you the only settler taking water out of Piney Creek?

A. There was a man came there the same time I did.

Q. And along about the 20th of June these settlers took all the water, both out of Piney and out of Sage Creek, did they not?

A. Why, I couldn't say that they took it all, no, sir, I could not.

444 Q. They all took water?

A. They all had water, yes, sir.

Q. Do you cultivate any gumbo land?

A. No, sir, I did not.

Q. You don't pretend to say from any experiments of your own as to whether it's productive or not?

A. Yes, sir, I have had experience with it.

Q. I thought you said you did not?

A. I said I did not cultivate any.

Q. Have you cultivated any gumbo land at all?

A. Yes, sir, I have.

Q. Where?

A. In Montana.

Q. Whereabouts?

A. On the Rosebud.

Q. You never cultivated any on the Sage Creek or its tributaries?

A. No, sir.

Q. What is the length of Pryor Mountain?

A. The length of Pryor Mountain?

By Mr. PIERSON: We will object to the testimony on the ground that the question is indefinite as to the length of Pryor Mountain.

A. I think it's about fifteen or twenty miles long.

Q. It has got length then as well as height?

A. Yes, sir.

Q. As well as thickness?

445 A. Could not be one single mountain unless it did have.

Q. And Sage Creek and all its tributaries rise in this mountain?

A. Yes, sir.

Q. Is it of uniform height through its whole length?

A. No, sir.

Q. Where is it the highest?

A. Well somewhere near the center of it.

Q. Near the center of it?

A. I should think so.

Q. Now where is the origin of the head of Sage Creek with reference to the highest point of the mountain?

A. It comes out about the highest point of the mountain.

Q. That Sage Creek comes out of?

A. Yes, sir.

Q. Isn't it usual for the heaviest snowfalls to be on the highest part of the mountain?

A. Yes sir; it is.

Q. Have you ever been to the head of Sage Creek?

A. Yes sir.

Q. Come out of one spring or a number of springs?

A. A number of them.

Q. At different elevations on the mountain?

A. Yes sir.

Q. Have you ever been to the head of Piney?

446 A. Yes sir.

Q. How many springs there?

A. One.

Q. One spring?

A. Yes sir; now I don't mean to say that there is just exactly one because there is several different springs there, but they are around there together.

Q. It's a group?

A. Yes, sir.

Q. Practically one head?

A. Practically one head.

Q. How did you come to make this experiment last summer with this water?

A. Well sir Mr. Bainbridge wanted some water down to irrigate some alfalfa and so we let him take the water for three days and run it down there.

Q. Did he get any water?

A. Very little.

Q. How?

A. No sir; he didn't get any; he got a little but none to speak of.

Q. Do you know the depth of the bedrock in this Sage Creek?

A. No sir; I do not.

Q. Are there any places in this creek where the creek itself is on the bedrock?

A. I couldn't answer that.

Q. Did you ever investigate it with reference to that?

A. No, sir; I never did; but I never seen any flat rock bottoms in Sage Creek yet.

447 Q. Where are these quicksand bars gravel bars?

A. There is one just above the mouth of Piney.

Q. How long is that?

A. How long is that one?

Q. Yes.

A. That quicksand bar there?

Q. Yes.

A. Well I don't know exactly how long it is but in crossing in there I have mired down there in the quicksand mired my horses down.

Q. That's all you know about it?

A. That's all I know about it.

Q. Now tell me where there is any other quicksand bar?

A. Down below there is more of them.

Q. Below what?

A. Below the mouth of Piney.

Q. How far below the mouth of Piney?

A. Well there is one down, about two miles there is one.

Q. How long is that?

A. Well I couldn't tell how long it is.

Q. You have just crossed?

A. I have crossed it and seen the quicksand.

Q. That's all you know about it?

A. That's all I know about it.

Q. What other one do you know of?

448 A. There is different places along there where I have crossed the creek; I can't call them all to mind just at this time.

Q. You have never investigated as to the extent of these quicksand bars?

A. No, sir; I have not.

Q. Did you ever make any investigations to ascertain whether the water that sunk in these bars of quicksand rose again?

A. No, sir; I don't know anything about the water after it sinks down; I don't think anybody but God knows that.

Q. So far as you know at the present time, if that country was still an Indian Reservation and not settlers there to interfere with this water, it would reach the places of Mr. Morris and Mr. Howell up to about June 20th.

By Mr. PIERSON: We object to that as irrelevant, incompetent and immaterial.

A. During high water it would reach them; other times it would not.

Q. That high water lasts to about the 20th of June?

A. Generally from about the 1st to the 20th of June, somewhere about that.

Q. What time do you commence irrigating in the summer?

A. In the spring you mean?

Q. Yes, in the spring.

449 A. Just as soon as the snow goes off and the ground gets dry.

Q. When is that?

A. Well, sir; it varies different years, sometimes one time, sometimes another, generally about the first of April and from that time on.

Q. Now, from the middle of May to the 20th of June you are engaged in active irrigation are you not?

A. Yes, sir.

Q. And all of the others settlers on that creek are?

A. Yes, sir! I think so.

Q. And you take water, and have done so ever since you first settled there, with reference to any claim that Morris or Howell may have to the water?

A. Yes, sir.

Q. What's become of the timber that was on Pryor Mountain?

A. The people have come up from Wyoming mostly and cut it off and hauled it away.

Q. Didn't cut any off until after the Reservation was thrown open, did they?

A. There wasn't so many people in there before the Reservation was thrown open.

Q. Pryor Mountain was within the Reservation?

A. Yes, sir.

Q. Did you settlers cut some of it off yourselves?

A. Yes, sir; we did.

450 Q. That's where you get your timber for wood and building purposes and fences?

A. Yes, sir.

Q. I understand you to say that it is between twelve and fifteen miles between Morris' and Howell's?

A. The way the creek runs.

Q. How far is it without reference to the creek?

A. Well, sir; it's six, seven or eight miles; somewhere along there.

Redirect examination.

(By Mr. PIERSON:)

Q. Mr. Bean, referring to the condition of the quicksand in Sage Creek, you have run stock over there in that country?

A. Yes, sir.

Q. And ridden the range on Sage Creek?

A. Yes, sir.

By Mr. McCONNELL: To which we object on the ground that it's leading and move to strike out the answers.

Q. Now state whether or not in crossing Sage Creek in riding the range you can cross the stream at any place or is it necessary for you to pick out the particular places on account of certain places?

A. It is necessary to pick out certain places in Sage Creek to cross it.

Q. Then state whether or not quicksand prevails generally along Sage Creek.

451 A. It does quite a good deal.

By Mr. McCONNELL: To which we object because its leading and move to strike out the answer.

Deposition of Corbett Bennett on Behalf of Answering Defendants.

CORBETT BENNETT, called and sworn on behalf of the answering defendants, upon examination by Mr. Pierson, testified as follows:

Direct examination by Mr. PIERSON:

Q. Mr. Bennett where do you reside?

A. I live in Billings at the present time.

Q. Where did you reside before living in Billings?

A. Near Bowler in Carbon County.

Q. How long did you reside near Bowler in Carbon County?

A. Since May, '99.

Q. What was your business?

A. I was farming, sheep-raising.

Q. You were farming?

A. Yes.

Q. You have a ranch there?

A. Yes, sir.

Q. Where was your ranch located with reference to Sage Creek?

A. It was on Sage Creek; Sage Creek run through the place.

Q. How long have you been acquainted with Sage Creek?

A. Since '92, the spring of '92.

Q. That's when you first saw Sage Creek?

452 A. Yes, sir.

Q. Where was it, that part of Sage Creek that you saw?

A. Well, probably the whole length of it; I was herding sheep on the creek up and down there and was familiar with the whole of it.

Q. Were you acquainted with it the summer of '92?

A. Well, I was off of the creek during the summer for a while but I was in there again in the fall; I went back in August and was there until November.

Q. Did you see Sage Creek below the mouth of Piney in 1892, the fall?

A. Yes, sir; I crossed it different places there.

Q. What can you say as to there being any flowing water in Sage Creek in the fall below the mouth of Piney?

A. Well, there was practically none; there was water standing in a few places and running slowly, seeping.

Q. You say you are a rancher?

A. Yes, sir.

Q. Had experience in irrigating?

A. Yes, sir.

Q. State whether or not there was sufficient water in Sage Creek at the time you saw it in the fall of '92 for irrigating purposes or to use as an irrigating head.

453 A. It was not enough so that a man could do anything irrigating with it.

Q. Where was this point with reference to the William Morris place?

A. It was above his place.

Q. State whether or not it was above his headgate, above the point where he got his water.

A. It's above the point where he took his ditch out.

Q. And state what the condition of Sage Creek has been after June 20th since 1892, as to whether or not it was carrying water each year.

A. Well, it has carried less water for the last few years than it did then. Well, since I have been living on the creek, for the last six years, it has carried less water than it did at that time.

Q. State whether or not Mr. Bennett if all the water from Sage Creek and Piney Creek were allowed to flow down uninterrupted, whether it would reach Mr. Morris' place after say July first?

A. Not enough to do anything with.

Q. Not enough to irrigate with?

A. Not any at all; not enough to irrigate with.

Q. Where does Sage Creek rise?

A. It rises on Pryor Mountain.

Q. Where does Piney Creek rise?

454 A. It rises also on Pryor Mountain at the base of the mountain.

Q. What was the condition of the Pryor Mountain as to being covered with timber or not when you saw it in '92?

A. Well, there was much more timber then than there is now; but since then there has been a big force of men in there cutting out ties for the last year and a half, and also men getting out coal braces for the coal mines at Bridger; that's been going on for the last seven years.

Q. What effect has this stripping of Pryor Mountain had on the water supply?

A. It causes the snow to melt much earlier; in fact it goes all at once, so that the snow water doesn't last as long as formerly.

Q. State whether or not this snow water causes any freshet in Sage Creek.

A. No, it does not, very little difference even for the short time there is; there is very little difference in Sage Creek.

Q. Does it cause any in Piney?

A. Well, it does more than in Sage Creek; the melting snow seems to affect that more.

Q. How soon in the season or what time in the season does this snow water cease to flow?

55 A. Well, that depends considerably on the time that spring opens up, but ordinarily from the first of June to the 20th or the last, somewhere around there.

Q. State whether or not, Mr. Bennett, any snow lies on Pryor Mountain the year round.

A. It's all gone in the summer and the most of it's gone after the first of July; all there is after that is the little patches amongst the clumps of timber and shady places.

Q. How far is it from Wallace Bent's place to your place?

A. Two miles.

Q. You are further down the creek?

A. Yes.

Q. How far is it, Mr. Bennett, from Wallace Bent's place to the head of Sage Creek?

A. Oh, I should judge it was eighteen or twenty miles; never measured it.

Q. That is as the stream meanders?

A. Yes.

Q. Following the meandering stream how far is it from Wallace Bent's place to Morris'?

A. At least forty miles.

Q. What is the condition of the creek-bed, Mr. Bennett between Wallace Bent's place or your place and Morris'?

A. Well, in that forty miles I don't think there is half a dozen places a man can ford it without getting stuck in the mud.

456 Q. What is the formation of the mud?

A. It's sandy; quicksand.

Q. And as to the fall of the stream, state whether it's a slow or a rapid stream.

A. It's a slow running stream, very little fall to it.

Q. And what effect do these conditions have on the supply of water in Sage Creek?

A. Well, you can notice a difference the further down the creek you go; it gradually gets weaker in the flow.

Q. State whether or not the water will seep into the quicksand.

A. Oh, yes.

Q. And state whether or not during the summer months evaporation takes place to any extent to be noticeable.

A. Well, I couldn't say as to evaporation; the evaporation perhaps has something to do with it and evaporation and seepage together certainly do nearly dry up the stream.

Q. Consumes the water?

A. Yes.

Q. Are you acquainted with the flow of Piney Creek in the latter part of the season?

A. Yes.

Q. You are?

A. Yes, sir.

Q. State what's the formation of the bed of Piney Creek below Mr. Bainbridge's or below Mr. Bean's place.

457 A. It's sandy and gravel with a few places where it's inclined to be quicksand, but it's most loose gravel.

Q. State whether or not if all of the waters of Piney Creek after July 20th were allowed to flow uninterrupted they would reach the mouth of Piney?

A. Well, I have crossed there a good many times before there was ever an irrigating ditch taken out of Piney and there was very little water from Piney getting into Sage Creek; you could water a horse on it and camp there and that was about all.

Q. Was the water flowing in Piney of sufficient quantity to reach Morris' place if it had been allowed to flow on?

A. No, sir.

Q. It would not?

A. No, sir.

Q. Were you present with Mr. Hine, the surveyor, at Morris'?

A. Yes, sir.

Q. At the time he made the survey?

A. Yes, sir.

Q. State whether or not you located the corners on Mr. Morris' ranch, his hundred and sixty described in his petition.

A. Yes, sir, Mr. Hine handled the instrument and Mr. Bean and I chained it, and we found all the corners.

Q. How many acres did Mr. Morris have on his land which was under ditch out of Sage Creek?

458 A. Well, we didn't measure the particular piece of ground that was under cultivation; it was kind of a three-cornered leg-of-mutton shape, but we judged about twenty or twenty-five acres, and the garden, perhaps an acre or so of the garden.

Q. Did Mr. Hine set his instrument and locate the corners?

A. Yes, sir, and we chained them out and found the corners, every one of them.

Q. And you noticed some other ground along Sage Creek, did you, that was on Mr. Morris' hundred and sixty outside of this twenty-five acres?

A. That was on his hundred and sixty?

Q. Yes.

A. Yes, we noticed the whole of his hundred and sixty.

Q. Outside of that twenty-five acres, Mr. Bennett, on the hundred and sixty, what was the character of the soil lying west of the creek as to whether it had been cultivated or not?

A. West of the creek it had never been cultivated with the exception of the garden; the garden was on the west side.

Q. That was about an acre?

A. Yes.

Q. What was the rest of it covered with?

A. Greese-wood from a foot high to as high as my head, sand-dunes and so on.

59 Q. Never had been cultivated?

A. On the west side, no.

Q. And had any of it been cultivated outside of this twenty or twenty-five acres?

A. It showed no evidence of it.

Q. Did you go to Mr. Howell's place?

A. Yes, sir.

Q. This time?

A. Yes, sir.

Q. Did you notice the condition of his headgate?

A. Yes, sir.

Q. What was the condition of it?

A. His headgate was made of two-inch stuff completely covered over, and the opening next to the creek was two feet long by five and a half inches deep, two feet long by five and a half inches deep.

The opening on the ditch side was filled up with rubbish and stuff that had drifted in there and filled it in.

Q. Did you pass over Mr. Howell's land?

A. Yes, sir.

Q. State whether it had ever been cultivated, or showed any indication of being cultivated?

A. Well, so far as looking at the ground now is concerned, shows no evidence of ever having been cultivated.

Q. Did he have ditches leading out on his land?

A. Yes, sir.

460 Q. State whether these ditches or laterals had run water or showed any indication of ever having been used.

A. No, they showed that they had never been used since they were built.

Q. What was the condition of Mr. Howell's dam in Sage Creek?

A. No dam at all, entirely gone; there had at one time been in, should judge, a temporary dam; there was a post set on each side of the creek and some boards put across evidently to back up the water, but they were gone.

Q. Mr. Bennett, how many acres of the Howell ranch is under his ditch?

A. Well, the survey showed one hundred and ten acres to be under the ditch.

Q. And as to the other ninety acres of his two hundred acre tract?

A. It lays on a gravel hill or ridge outside of his fence.

Q. And could it be covered by a ditch?

A. It would be impossible to get a ditch onto it.

Q. What is the character of this one hundred and ten acres that you spoke of, soil?

A. It is a blue gumbo.

Q. And what can you state about its being productive soil or not?

461 A. Well, I know that it is not.

Q. Mr. Bennett, are there any other persons having dam in Sage Creek and ditches diverting water other than the parties who are named in this suit?

A. Yes, sir.

Q. Who are they?

A. There is Delph Thormalen, Burlington Railroad, A. W. Adams, Thomas Rule, John Frost an Indian, George Crosby Mormon.

Q. What's the postoffice address of these people?

A. The postoffice address of all of them excepting the Burlington Railroad Company is Bowler, Carbon County. Frost there gets his mail at the Pryor Agency.

Q. State whether or not these parties divert water from Sage Creek when they are able to do so.

A. They all do.

Cross-examination.

(By Mr. McCONNELL:)

Q. State whether or not they have acquired the rights from any of the persons who are parties to this suit after this suit was commenced.

A. No, not after this suit was commenced; yes, I guess Crosby did.

Q. Who did Crosby acquire his right from?

A. O. S. Erickson.

462 Q. He is a party to this suit?

A. He was in one of the first complaints; I don't think he is in this last complaint.

Q. Your first acquaintance with Sage Creek was when?

A. The spring of '92.

Q. You were engaged in the sheep business then?

A. I was herding sheep then for Mr. Howell.

Q. For Mr. Howell?

A. Yes, sir.

Q. Was he operating from his place down there in Wyoming?

A. Well, he was operating from his homestead; he had a homestead fifteen miles from where this place is that he claims now as a desert.

Q. That was his homestead?

A. Yes, sir.

Q. The range that the sheep occupied embraced the region around his desert claim that is now in controversy?

A. Yes, up around Sage Creek, covered as much country as we could get there.

Q. How long did you work in that employment?

A. I worked for Mr. Howell eighteen months and then bought sheep of my own and have been familiar with the country ever since; for the last five years I have lived continuously, until about a month ago, on Sage Creek.

463 Q. Now, I will ask you if you know of any place on Sage Creek where the water rose in the way of springs?

A. Yes, sir; there were some springs on the place that I own two miles below Wallace Bent's; there were two or three small springs.

Q. That was on Sage Creek?

A. That was on Sage Creek; from there down there is no sign of springs.

Q. What is the distance from those springs down to Morris' ranch?

A. Well, thirty-eight miles, I will say.

Q. Is that direct line or by meanderings of the creek?

A. Meanderings of the creek.

Q. What is it by direct line?

A. By direct line it is somewhere around twenty miles.

Q. How far is it called by the road?

A. Well, that would be the road, about twenty miles, I don't know exactly; somewhere near that.

Q. You think the meanderings of the creek would double the distance?

A. Yes, sir, very easily; it cuts letter S's all the way down.

464 Q. You were with the surveyor when he was doing some surveying at the ranches of the plaintiff and the intervener?

A. Yes, sir.

Q. Did you undertake to examine the lands of Mr. Morris to see how much—if you could tell how many acres had ever been irrigated?

A. Well, we examined it pretty thoroughly under the ditch, everything about the ditch, everything that could have been irrigated from that ditch.

Q. Well, after several years have elapsed after land has been cultivated in that country, the appearances of cultivation pretty well pass away?

A. Well, all the vegetation might be dead, but any land that's been put in shape to be irrigated, it will show evidences of it for almost all time to come, if a man is familiar with farming at all.

Q. If some of that land had been irrigated you could tell it?

A. Oh, yes, you could tell it.

Q. You could tell it if it had been irrigated?

A. Yes, sir.

Q. State whether you can tell after it has been irrigated for wild grass and not plowed, can you tell years afterwards that it has been irrigated?

By Mr. PIERSON: To which we object as irrelevant and immaterial.

465 A. There is no land on Mr. Morris' place that has ever been irrigated for wild grass.

By Mr. McCONNELL: I move to strike that out because it's not responsive to my question at all.

A. If there has ever been any grass there it can be told; it would certainly be a better growth than there is there.

Q. Always afterwards?

A. It would in your lifetime and mine; perhaps, not forever.

Q. By your life time and mine you mean about seventy-five years, don't you?

A. Yes, sir.

Q. Did you ever cultivate any gumbo soil in that country?

A. I never did myself.

Q. Is that ranch of Howell's in a basin?

A. Yes, sir; it has the appearance of being an old lake-bed.

Q. And you say that's not rich?

A. Well, judging from Howell's experience in cropping on it, I should say not very much.

Q. What do you know about Howell's experience?

A. Well, in '93 he raised the best crop that he ever did; in fact, the only crop he ever did raise there that he pretended to thresh to amount to anything. I bought some of the oats and they would

466 weigh sixty-five and seventy-five pounds to the sack when they ought to weigh from one hundred and ten to one hundred and fifteen pounds to the sack of good grain.

Q. That was when?

A. The winter of '93 that I got those oats.

Q. Was it the crop of '93?

A. I got the grain in the winter of '93.

Q. Well, what month?

A. Well, I couldn't say; I got it two or three different times along during the winter.

Q. Well, winters have two ends, beginning and ending; which end do you mean? Was it in November or December, '93?

A. I think it was in December, '93.

Q. Then it would be the crop of '93, would it not?

A. I presume likely it would.

Q. These settlers were using water up there on the Reservation at that time, were they not?

A. Yes, sir; I won't be sure it was the crop that was raised in '92 or '93; it was in December, '93, I got the grain.

Q. There is plenty of water, is there not, in Piney Creek up to about the 20th of June every season?

A. Well, I don't know what you would call a plenty; the settlers along there take it all out and there don't none of them seem to have enough.

Q. Up to that time?

467 A. Up to that time.

Q. How many inches of water will that stream carry in the spring?

A. Oh, I don't know; think it would carry probably one hundred and sixty inches at the best; it's just formed from the springs.

Q. Did you hear the testimony of one of these witnesses in which he said it carried over five hundred inches?

A. No, sir, I did not; I think he is badly mistaken.

Q. Did you ever measure any water?

A. I have helped to measure some; I don't pretend to be a professional.

Q. How do you measure it?

A. We measured it by running it through a box; we took a box twelve inches wide and run the water through the box and measured the depth.

Q. How did you tell by just running it through the box?

A. Measured the depth.

Q. Did you measure to a standstill anywhere in the box?

A. We put a headgate in to back it up.

Q. Then how did you get it over the headgate?

A. We put in the headgate to back it up, to get a head or pressure so as to measure it.

Q. How much backing did you give it?

468 A. Six inches.

Q. How high would it be the water, above the opening through which it passed?

A. Well, the way we measured it we called a cubic inch an inch of water. For instance, running through the twelve-inch box one inch deep, we figured it twelve inches of water.

Q. You just multiplied the length of the volume of water—

A. The width and depth.

Q. You get the cubic measurement of anything by multiplying the three dimensions together?

A. The three dimensions?

Q. Yes, width, length and thickness.

A. Well, we will call it square inches then.

Q. You did that on the suggestion of counsel. Now, then, how many square inches did you get there?

A. Well, in that particular place—I never measured in Piney Creek—we was measuring in a ditch.

Q. Square measure only gives you the surface of anything, don't it?

A. I don't know whether it would or not.

Q. If you multiply the length and width of a plane together it gives the number of square inches in the surface if the lines are in inches? Then, if it's square measure you were after you just got the surface of that water, isn't that all?

469 By Mr. PIERSON: We object to this line of testimony on the ground that it's argumentative.

A. Well, I tell you the way I measured the water.

Q. Well, answer my question.

(Question repeated.)

A. Oh, you get the depth of it.

Q. If this table is three and a half feet long and two feet and a quarter wide, multiply these two together, you get the number of square feet in the surface?

A. Yes.

Q. Then if you multiply the length and width of your box that you had the water in you get the number of square inches in the surface of the water, don't you?

A. Yes.

Q. That's the way you measured it?

A. I measured the depth of the water by the width of it

Q. You measured the depth by the width?

A. Yes, sir.

Q. How did you perform that operation?

A. Well, if it was twelve inches wide and two inches deep we called it twenty-four inches of water.

Q. In other words, you multiplied the width and depth to get the cubic inches?

A. Well, that's the way I had of measuring the water.

470 Q. Now, you speak about there being more water when the snow was melting in Piney Creek than in Sage Creek. I will ask you if the length of Piney Creek isn't less or shorter than Sage Creek?

A. Oh, yes, the length of Piney Creek is much shorter than Sage Creek; it's a short stream.

Q. Will not the water, then from the melting snow come down more rapidly and make a more apparent rise in the short creek than in the long one?

A. The water is changed by the way it rises on the bank; I don't see as the length of the creek would make any difference.

Q. Which creek has the largest area of drainage from the mountain, Sage or Piney?

A. Sage Creek.

Q. Well, then, more water will come down Sage Creek than down Piney but it takes it longer to come?

A. Well, no, as there is more water comes down Sage Creek than there is down Piney, and the melting snow raises the two streams practically at the same time.

Q. Well, if more water comes down Sage Creek from melting snows than down Piney, what's the reason the rise isn't higher in Sage Creek than in Piney? If it melts more rapidly at the head of Sage Creek, would not the rise in Sage Creek be greater at the time than it would be in Piney Creek?

471 A. Well, no; it isn't greater. There is hardly any perceptible difference when the snow is going off in Sage Creek and when it isn't.

Q. Don't make a great deal of difference?

A. No.

Q. Sage Creek has a supply of water then that does not depend on the snow?

A. No, sir, it's fed by the springs.

Q. The water comes from the bowels of the mountain?

A. Yes, sir.

Q. Internal and invisible reservoirs?

A. Invisible anyway.

Q. Did you ever see the bedrock in Sage Creek anywhere?

A. No, sir.

Q. Do you know what bedrock means?

A. Yes, sir.

Q. What does it mean?

A. It means a strata of solid rock underlying the surface as I understand it.

Q. As distinguished from that part that's brought there naturally from the surrounding country?

A. Yes, sir.

Q. These sandbars and gravel-bars are deposited there by the water, are they not?

A. Well, it is generally supposed that they were.

Q. And they rest upon this bedrock underneath?

472 By Mr. PIERSON: To which we object for the reason that it's incompetent. We have not qualified the witness as a geological expert and the cross-examination is improper.

Q. Now, somewhere underneath these gravel-bars and quicksand bars is the solid bedrock?

A. Yes, a long ways down on Sage Creek.

Q. Did you ever dig down to find it?

A. I have been down belly-deep on a horse lots of times.

Q. Did your horse ever strike bed-rock?

A. No, they undoubtedly didn't.

Q. How did he come to get out; what's the reason he didn't keep on going down?

A. Pulled him out with a team.

Q. Pulled him out with a team?

A. Yes, sir.

Q. How do you know it's no deeper than that horse went down?

A. Well, I will tell you one way. I have taken tepee poles and shoved them down the full length of them, and it was still soft as far as I shoved them down.

Q. How many places did you do that?

A. Two different places that I tried that.

Q. Above the mouth of Piney or below?

A. Below the mouth of Piney.

473 Q. In Wyoming or Montana?

A. In Wyoming.

Q. Into what stream does Sage Creek empty?

A. Stinkingwater.

A. Also called Shoshone River, isn't it?

A. Yes, sir.

Q. How far is it from Morris' place to the mouth of Sage Creek?

A. It's somewhere around fifteen or eighteen miles.

Q. It's not very far, then, from Howell's place?

A. Well, I think that Howell's place is nearly halfway.

Redirect examination.

(By Mr. PIERSON:)

Q. Mr. Bennett, Judge McConnell has asked you about these places of quicksand along Sage Creek; how prevalent are those places?

A. Well, the creek from Wallace Bent's place down is practically all that way to where it empties into the river; there is just occasionally a place that you can cross.

474 *Deposition of Samuel W. (Bert) Bent on Behalf of Answering Defendants.*

SAMUEL W. (BERT) BENT, a witness called and sworn on behalf of the answering defendants, upon examination in chief by Mr. Pierson, testified as follows:

Direct examination by Mr. PIERSON:

Q. Mr. Bent you are one of the defendants in this suit?

A. Yes, sir.

Q. Where do you reside?

A. At Bowler on Sage Creek.

Q. How long have you been acquainted with Sage Creek?

A. Since '93, 1893.

Q. How far is it from your place on Sage Creek to the Morris' ranch?

A. It's about eighteen miles.

Q. That is in a straight line?

A. Yes, the way the road runs.

Q. Well, following the course of the stream how far is it?

A. Why, it would be double that far easily. I think more than that; the creek is awfully crooked down through that country.

Q. Mr. Bent, are you acquainted with the formation of Sage Creek along this forty miles?

A. Yes, sir.

475 Q. State what is the condition of the bed of the creek.

A. Why, it's a very boggy creek, quicksand or marshy, sluggish, kind of sluggish creek it is from my place clear on down to the mouth of it.

Q. How far is your place from Wallace Bent's?

A. My place is below; it joins his place.

Q. Well, to what extent does this quicksand avail?

A. Well, it's practically all that way; there is a very few crossings that stock people can cross; I don't know of any crossing except right at Jack Morris' house that a person can cross with a wagon at all going down; no road crossing.

Q. Mr. Bent, what can you say as to the water flowing on down and reaching Morris' place after the month of June, say the 20th of June, each year?

A. You mean if it was all turned loose?

Q. Yes, sir.

A. In Sage Creek and Piney?

Q. Yes sir.

A. There would be very little reach him after the hot season starts in and the snow has melted off, there would be very little, if any, from the middle of June or the 20th.

Q. Would there be any reach him in sufficient quantity to irrigate with?

A. No, sir.

476 Q. Did you visit Mr. Morris' place with the surveyor?

A. I did not, no.

Q. You did not?

A. No, sir; I have been on his place though, I am familiar with his place.

Q. You are familiar with his place?

A. Yes, sir.

Q. Do you know where his hundred and sixty is located as described in his complaint?

A. Yes, sir.

Q. You are acquainted with it?

A. Yes, sir.

Q. How much land of that hundred and sixty is there under his ditch?

A. Well, the ditch he has got now, I should judge that there

might be sixty acres of his whole hundred and sixty under that ditch on the east side of the creek.

Q. On the east side?

A. Yes.

Q. Do you know how much he has irrigated?

A. Well, from the general appearance of his place he has irrigated about twenty or twenty-five acres.

Q. Twenty or twenty-five acres?

A. Yes, sir.

Q. This you form as an estimate and not from measuring?

477 A. Not from measuring, no, sir.

Q. On the west side of the creek do you know the condition of the ground there as to whether it's been tilled or not?

A. Yes, sir, I do. There is a small patch of garden on the west side that's been irrigated.

Q. And the rest of it?

A. Well, it's sagebrush land, wild land with high sagebrush, nothing ever been done with it.

Q. As to Mr. Howell's place, do you know that?

A. Yes, sir.

Q. Do you know where the two hundred acres is that is described in his complaint?

A. I do.

Q. That the surveyor was around this year?

A. Yes, sir.

Q. How much of his land can be irrigated from his ditch?

A. I think there is three forties that could be irrigated, eighty acres on top of the ridge; the bigger part of it is under the ditch.

Q. It is the larger part of three forties.

A. Yes, sir.

Q. Would you say all of the three forties?

A. No, sir, but the greater part of them. There is two or three corners; two corners of these forties, I think, is outside of
478 his ditch that could not be irrigated from the ditch.

Q. What's the character of this soil?

A. Why it's old lake-bed, old gumbo lake-bed.

Q. What would you say as to its productive quality?

A. Why, there might come a year that a man could raise something there but it's awful doubtful; it would depend on God Almighty more than it would artificial irrigation.

Q. Well, Mr. Bent, do you know whether or not Mr. Howell's land is affected by the surrounding conditions?

A. Yes, sir, it is an old lake-bed, and with an ordinary winter and the snow going off and the rains, if we have any, in the spring, causes the water to stand there.

Q. On his ranch?

A. Yes, sir, on his ranch, except eighty acres and it's so high the water can't get on it.

Q. What effect will that water standing on it have?

A. It's no good at all unless it's for a duck-pond or something like that.

Q. Is it possible to cultivate it?

A. No, sir; not them seasons; there might come a dry season if it happened to be just right, just water enough and not too much; he might happen to raise a crop but it's nothing that a man could depend on.

Q. Do you mean to say by that generally the water stands there?

A. Well, it has stood there several different times; one time in particular I know of that water was there in July, the 7th day of July, six years ago, right at the fence; that's on the highest part of the ground. A man couldn't ride in there on horseback, and in the center of his place the water was from a foot to two feet deep; that was caused from snow and rains.

Q. What can you say, Mr. Bent, as to the water supply in Sage Creek at this time as compared with it in 1893 when you first located here?

A. Well, there isn't near as much water there.

Q. And can you account for that shortage?

A. Yes, sir, it's on account of the timber being cut out on the mountains; its best cut out mostly by Wyoming people too.

Cross-examination.

(By Mr. McCONNELL:)

Q. Therefore, you think that they ought to take away the rights of Wyoming men?

A. Why, I don't think they ought to ask us for something we haven't got.

480 Q. You have got water up there, have you not?

A. Why, we have water there; we haven't got any large amount, though.

Q. Well, what you have got, such as you have got, you are willing they should have, are you?

A. No, sir.

Q. You are not?

A. No, sir.

Q. Like Peter, "Silver and gold I have not, but such as I have you may have"; is that the idea?

A. Even if we were willing to turn it down there they wouldn't get it; it wouldn't reach them.

Q. The best way to determine that is to try it, isn't it?

A. It has been tried—tried before we settled on the creek.

Q. Ever try that with them?

A. No, sir.

Q. They have been after it?

A. Never been after me for it.

Q. You have heard of them being up there after it?

A. Never heard of it personally.

By Mr. PIERSON: We object to that as incompetent, hearsay evidence.

A. They never asked me personally for a drop of water, either one of them.

Q. Have they asked any of your neighbors, to your knowledge?

481 A. Not to my knowledge; I never heard them.

Q. Haven't you talked it over with your neighbors as to whether you would let them have any water?

A. No, sir; I haven't.

Q. Haven't you all agreed that you would not do it?

A. No, sir.

Q. Didn't you take the advice of lawyers, and didn't they tell you that a man that lived in Wyoming couldn't take water from a man in Montana?

A. I don't know that a lawyer ever told me anything about it.

Q. You have acted upon that theory, haven't you?

A. We have acted on the theory that it would be no good to turn it down to them.

Q. Did you ever try to verify that theory?

A. It's been verified before I got there.

Q. When did you go there?

A. 1893.

Q. Who tried it—the Indians?

A. I don't know who you could lay it to; there was no one there to use the water, to take it.

Q. When it was an Indian Reservation the water went down to them, didn't it?

A. Why, it might have went there occasionally, but then in the irrigating season I don't think it would.

482 Q. Did anybody give them a trial, to your knowledge, as to whether they could get this water or not after the settlers went in there?

By Mr. PIERSON: To which we object on the ground that it's irrelevant and immaterial.

A. I can't recall to mind any certain time they did; no, I don't know that they ever did and I don't know that they didn't.

Q. Don't you know that Mr. Howell has had to abandon the cultivation of his place entirely on account of you settlers taking the water?

A. No, sir; he has got nothing to abandon; he has got nothing to stay there for; he hasn't any place there; he has got kind of a fence there; it wouldn't make a good Indian fence; he hasn't got anything to abandon.

Q. He is the owner of one hundred and sixty acres of land there?

A. I believe he claims two hundred acres.

Q. He has a portion of it fenced, has he not?

A. No, sir; there is wires there and posts, but it wouldn't keep out any kind of stock, not since I have been there.

Q. What time did you first become acquainted with Howell's place?

A. In 1893.

Q. You never knew what he raised on that before that?

483 A. There was nothing there to show that he ever raised anything.

Q. Well, you don't know that he didn't raise anything?

A. No, sir.

Q. Didn't see it?

A. No, sir.

Q. When you went there to settle how many other settlers were there on the creek?

A. I couldn't say as to that; I don't think, though—I can't call to mind all of them. I should judge there was four or five, though.

Q. How long had you been there until you heard of the claim of Morris and Howell to this water?

By Mr. PIERSON: We object to that on the ground that it's irrelevant and immaterial.

A. Why, it was shortly after we went there; they made a claim, I think, the next summer and they might have made a claim before; I don't know.

Q. What time did you go there?

A. In the fall.

Q. They would not need the water until the next year, would they?

A. No, I think not.

Q. You heard of them claiming it that year?

A. Heard of them claiming it the next summer.

Q. Yes.

A. Yes, I think they made a claim for the water next summer.

Q. And they have been making it ever since?

484 A. No, they haven't; it's dropped out for two or three years. I think it was dropped out for three years that they never made no claim.

Q. That's when it was in litigation?

A. No, sir, the case was throwed out; it was not in litigation I think for three years.

Q. Well, it was in litigation?

A. It was before.

Q. Mr. Howell got a decree?

A. And the decree was thrown out.

Q. It was defective and you didn't pay any attention to it.

A. Our water was decreed to us by the courts of Montana and we was trying to live up to it.

Q. They had nothing to do with that litigation?

A. No, but we claimed the water and if we had turned any water down below our headgates the people above us would have come unto us for damages.

Q. But I say these two people in Wyoming had nothing to do with this litigation?

A. No, sir.

Redirect examination.

(By Mr. PIERSON:)

Q. Mr. Bent, how much water runs in Sage Creek during the irrigating season after you begin to irrigate?

485 A. Why, there isn't to exceed three hundred inches in Sage Creek.

Q. Well, does this amount of three hundred inches continue during the entire irrigating season?

A. Well, some years it's less; very seldom more.

Q. Well, understand the question: Does this flow of three hundred inches continue during the entire season?

A. Yes, sir, I think we get possibly three hundred inches; that is, there is about three hundred inches comes down there that we settlers on the creek can get the benefit from.

Q. Well, would these three hundred inches reach your place?

A. No, sir.

Q. Then what would be the flow of Sage Creek during the irrigating season at your place?

A. Why, two hundred and twenty-five inches is our right and our headgate will take in that much, and we never have had our full amount at any time.

Q. Never have had?

A. No, sir, not during the irrigating season.

Recross-examination.

(By Mr. McCONNELL:)

Q. Is your place above or below the mouth of Piney?

A. It's below the mouth of Piney.

486 Q. Then three hundred inches comes down there sometimes?

A. Yes, sir.

Q. How far are you from the mouth of Piney?

A. About six miles.

Deposition of Wallace Bent, Recalled on Behalf of Answering Defendants.

WALLACE BENT, a witness called and duly sworn on behalf of the answering defendants, upon examination in chief by Mr. Pierson, testified as follows:

Direct examination by Mr. PIERSON:

Q. I believe you have testified before?

A. Yes, sir.

Q. Mr. Bent, how long have you been acquainted with Sage Creek?

A. Ever since the summer of '93.

Q. You divert water from Sage Creek?

A. Yes, sir.

Q. How far is it from your place to the head of Sage Creek?

A. It's in the neighborhood of twenty miles.

Q. And how does the water supply compare in Sage Creek at this present time with the years when you first settled on the stream in '93?

- 7 A. Well, in late years we haven't been getting the amount of water in the creek that we used to get before.
- Q. And what is the cause of this shortage of supply at this time?
- A. Well, the cause is the timber being cut on the mountain; destroying the timber causes the snow to melt more rapidly in the spring.
- Q. What apparent effect does the melting of the snow have on the supply of Sage Creek?
- A. Well, it increases the volume of water during the time.
- Q. Well, to what extent?
- A. Well, there is double the amount of water, possibly more than double the amount of water.
- Q. While the snow is melting?
- A. While the snow is melting that there is later *no*.
- Q. How long does this snow water continue?
- A. Well, the high part of it continues until about the middle of May, and then it begins to run down until by the first or the middle of June there isn't any snow water coming down practically.
- Q. And after the middle of May or the first of June about how much water is there flowing in Sage Creek at your place?
- 8 A. There is about from two hundred and twenty-five to two hundred and fifty inches.
- Q. That's the extent of the flow there?
- A. Yes, sir.
- Q. And how far is it from your place to Morris' place?
- A. It's about sixteen or eighteen miles; something about like that.
- Q. In a direct line?
- A. Yes, sir.
- Q. Following the meandering course of the stream, how long is along the course of Sage Creek from your place to Morris'?
- A. The creek is so awfully crooked that in my judgment it would be at least double that distance if not more, probably it would be more; I would put it at about forty miles around the creek.
- Q. What is the condition of Sage Creek as to being a fast or sluggish stream?
- A. After it gets out of the mountain, after it leaves the mountain, it's a slow running stream.
- Q. And say from your place to Morris'?
- A. From my place to Morris' it's a slow-running stream, sluggish stream.
- Q. What is the character of the creek-bed, the formation of the creek-bed?
- A. Well, the formation of the soil for a good part of the way is sand, bad-land hills, and the bed of the creek is more or less sandy and gravel-bars up above and quicksand below.
- Q. What effect does this condition of the creek-bed and the character of the stream have on the supply of water as it proceeds down to your place?
- A. Well, the water seeps into this formation a whole lot more than it would into some other kinds of formation.

Q. What can you say as to the seepage below your place and the creek bed compared with what it is above your place on Sage Creek?

A. In reference to the water seeping?

Q. Yes.

A. Well, above there it's a solider formation; still there is gravel above.

Q. Some seepage then above your place?

A. There is some seepage above; yes.

Q. Mr. Bent, how long have you been acquainted with Mr. Morris' place?

A. Since the summer of '94.

Q. Then, what can you say as to water reaching Morris' place during the irrigating season?

A. I never knew of it reaching his place during the irrigating season.

Q. Have you seen the creek occasionally?

490 A. Yes, I have had occasion to cross it; I used to do some freighting down there and crossed by Jack Morris' in doing that work.

Q. And what would be the condition of the creek when you would see it?

A. Why, the hot part of summer it was always dry down there.

Q. Now, you spoke about this sand formation in the bed of the creek; how extensive is that sand formation?

A. Why, it's all up and down the creek there so that a person in crossing the creek has to hunt a place, has to be particular to hunt a place to cross to avoid getting into these bad places.

Q. Are you acquainted with Mr. Morris' place?

A. Yes, sir.

Q. And where his ditch is?

A. Yes, sir.

Q. How many acres of land is Mr. Morris able to irrigate or cover from this ditch that he has on Sage Creek?

A. Well, I don't know just where his lines are.

Q. Oh, you don't know where the lines are?

A. No.

Q. Do you know the character of the soil lying west of Sage Creek as to whether it has been tilled or not, on Morris' place?

A. Yes, sir.

Q. State whether or not it has.

491 A. No, sir, it has not. It's just natural grease-wood and sage brush as it ever was in the world.

Q. Not been tilled?

A. Not been tilled.

Q. Are you acquainted with Mr. Howell's place?

A. No, sir.

Q. Don't know anything about the Howell place?

A. No, sir.

Q. Are you acquainted with Piney Creek?

A. Yes, sir.

Q. How long have you known Piney Creek?

A. Since the summer of '94.

Q. Are you acquainted with the usual flow of water in Piney Creek?

A. Yes, sir.

Q. And what can you say as to the flow of water in Piney Creek during the spring of the year?

A. Well, Piney in the spring of the year usually has a pretty good head of water in it; it might have—at times it might have five hundred or a thousand inches of water in it.

Q. Well, why do you say at times?

A. Well, when the snow is melting in the spring, coming off the mountain.

Q. How long does this flow of say five hundred inches continue, how late in the season?

A. Well, it runs low just as soon as the snow melts, and as soon as the snow goes off the face of the mountain then all it has
492 is what water rises in the spring at the head of the creek.

Q. What time is it usually that the snow leaves there?

A. Oh, on an average about the 20th of June.

Q. Practically disappears at that time?

A. No, not all, but there isn't any great amount left, possibly—
oh, one hundred inches maybe.

Q. That's the water, but I am asking you about the snow.

A. It gets no more snow after that time of the year.

Q. After June 20th?

A. No, sir.

Q. You say there would be perhaps one hundred inches in Piney after June 20th?

A. For awhile; it's according to the summer; if it's a red-hot summer it wouldn't be that much.

Q. Well, Mr. Bent, what's the formation of the creek-bed of Piney?

A. It's a gravel formation.

Q. If the water in Piney Creek were allowed to run -interrupted after June 20th would it reach the mouth of Piney?

A. No, sir, because I have seen the water in Piney and it didn't go down to the mouth.

493 Cross-examination.

(By Mr. McCONNELL:)

Q. You say you never saw any water reach Morris' ranch?

A. Not in the hot part of the summer.

Q. And your first acquaintance with it was in 1894?

A. Yes, sir.

Q. At that time the settlers up there in Montana were using the water, were they not?

A. They were using water.

Q. Using it all were they not and quarreling among themselves for more?

A. Well, they was using a good bit of it, any way.

Q. Were they not dickering with one another as to who should have it?

A. They were not in litigation.

Q. Well, were they not jarring about it?

A. No, I don't know as they were jarring about it; they might have been too.

Q. Don't you know they were using every drop of it?

A. Yes, I don't know but what they were.

Q. Then how did you expect it would reach Morris when they were using it all up there?

A. Well, even if it had been turned into the creek it would not have reached Jack Morris.

494 Q. How do you know that?

A. Well, that's my idea of it.

Q. Precisely; you never saw it tried?

A. No, I don't know as I ever saw it tried.

Q. Morris was up there to you after water three times, wasn't he?

A. I don't remember about that, whether it was three times or two times; Morris was up there after water in that country.

Q. How many times? You have been examined before in this case?

A. Yes, sir.

Q. You were asked the question: "Did they ever come to you for water?" referring to Howell and Morris, and didn't you answer "Well, I think that Howell came to me for water once, and Morris has come to me three times I think"?

A. "I think." Well I did, I think it was about that.

Q. Did he come up there in '94?

A. I expect he did, I wouldn't be positive—no, I don't think he ever did; I don't think I saw either one of the men in '94.

Q. Did you turn any water down to him when he did come?

A. No.

Q. Did any of the neighbors turn any down to him?

495 A. I don't know; I didn't see any of them turn any down.

Q. Don't you know they didn't?

A. I don't think they did, but I don't know they didn't.

Q. Then you are not surprised that Morris didn't get any water?

A. No, I don't know as I am.

Q. Didn't you neighbors talk it over there together about letting Morris and Howell have water?

By Mr. PIERSON: To which we object as irrelevant and immaterial.

A. No.

Q. Didn't you say you did when you were examined before?

A. We have talked so much about that water that I don't hardly know what we have said among ourselves.

Q. Did you not all agree that you would stand together and that they should not have the water, that they had no right to it?

By Mr. PIERSON: We object to that for the reason that this was all gone into when the witness was on the stand before.

A. It seems to me like we did have some sort of an agreement like that; I wouldn't be positive, but I think we did.

496 Redirect examination.

(By Mr. PIERSON:)

Q. Mr. Bent, do you mean to say that there was any concerted action on the part of all the settlers on the creek that they should unite against anybody in particular?

A. No, sir.

Recross-examination.

(By Mr. McCONNELL:)

Q. You don't know what's meant by concerted action, do you?

A. Well, I have got kind of an idea that if we had signed a contract among ourselves not to let Jack Morris have water, that would have been a concerted action, would it not?

Q. Then you didn't enter into a written agreement?

A. No, sir.

Deposition of William Bainbridge on Behalf of Answering Defendants.

WILLIAM BAINBRIDGE, called and sworn as a witness on behalf of the answering defendants, upon examination in chief by Mr. Pier-son, testified as follows:

Direct examination by Mr. PIERSON:

Q. You are one of the defendants in this case, Mr. Bainbridge?

A. Yes, sir.

497 Q. Where do you reside?

A. On Piney Creek, in Carbon County.

Q. How long have you been acquainted with Piney Creek?

A. Since the fall of '96.

Q. Are you acquainted with the flow of water in Piney Creek since '96?

A. Yes, sir.

Q. What can you say as to the amount of the flow of water in the spring of the year in Piney?

A. Well, for probably four of five weeks there is a large flow; probably four or five hundred inches.

Q. How late in the season does the flow of this quantity continue in Piney?

A. Well, when I first went there in '96 we used to figure that the flow would keep up nearly to the first of July, but the last two or three years it's gone away quicker, and now about the middle of June it gets down to a very small flow.

Q. Well, after the middle of June state whether or not there is sufficient water in Piney Creek to reach its mouth?

A. No, sir.

Q. What's the formation of the creek-bed of Piney?

A. It's very gravelly.

Q. State whether or not you have experimented with the waters of Piney at any time to know whether it would reach its mouth.

A. Yes, sir, I have.

Q. Explain the occasion and the time.

498 A. Well, two years ago I tried it; I got the neighbors to turn all the water in and I couldn't get it to my ranch, couldn't get the water to my ditch.

Q. Why were you unable to get it?

A. It sunk in the bed of the creek.

Q. And what time of the year was this?

A. That was in July, I think.

Q. Were you acquainted and have you been acquainted with Sage Creek at the mouth of Piney since '96?

A. Yes, sir.

Q. How far is your ranch from the mouth of Piney?

A. In a straight line it's about a mile and a half.

Q. State whether or not there would be any water running in Sage Creek these various years after the middle of June.

A. In Sage Creek?

Q. Yes.

A. Very little, if any.

Q. Are you acquainted with Sage Creek?

A. Well, on the lower end I am very well acquainted with it.

Q. You mean down in the vicinity of Morris' place?

A. Well, from Bent's down to Morris'.

Q. How far is it from Wallace Bent's to Morris' by the creek?

A. By the creek?

Q. Yes.

A. Between thirty-five and forty miles.

499 Q. And what's the character of the bed of the stream?

A. Well, it's very boggy; I have never investigated the creek the whole length of it, but I know people have to pick their places to cross the creek.

Q. Why is this necessary?

A. Because you get bogged down and mired.

Q. What can you say as to the creek as to whether it's a fast or a sluggish stream?

A. It's a slow stream.

Q. And as to being comparatively straight or crooked?

A. It's very crooked.

Q. Mr. Bainbridge, what can you say as to the water reaching Mr. Morris' place during the irrigating season if all the water of Sage Creek were allowed to flow down, as well as Piney, uninterrupted?

A. Well, during the hot weather I don't think it would ever reach Mr. Morris' place.

Q. From what time?

A. From the end of June on until cool weather in the fall.

Q. Would not reach his place?

A. Would not reach his place.

Q. You were not present with the surveyor at Morris'?

A. No.

Q. Were you down at Howell's?

A. No.

Q. You don't know about their lands then?

500 A. No.

Q. Have you a ranch on Piney Creek?

A. Yes, sir.

Q. In what county and state is that ranch situate?

A. Carbon County, Montana.

Q. State whether or not you have your homestead filing under the homestead laws of the United States on the southwest quarter of the southeast quarter of section thirty-five township eight south of range twenty-five east and the northwest quarter of the northeast quarter and the north half of the northwest quarter of section two in township nine south of range twenty-five east?

A. Yes, sir.

Q. That's the description of your land?

A. Yes, sir.

Q. You now have a homestead filing on it?

A. Yes, sir.

Q. And you have not proved up on it?

A. I have put in my application; I have not proved up yet.

Q. When did you settle upon this land?

A. I settled on the land in August, '96.

Q. Where have you resided since that time?

A. On the ranch.

Q. What kind of land is it as to whether its agricultural in character or not?

A. It's agricultural land.

501 Q. State whether or not it borders on Piney Creek.

A. Piney Creek runs through it.

Q. Can it be watered from Piney Creek?

A. Yes, sir.

Q. State whether or not this land requires irrigation.

A. Yes, sir.

Q. It does?

A. Yes, sir.

(It is agreed between the attorneys in the case that the lands claimed by the defendants, as described in their pleadings, are desert and arid lands, and require and will require water for the irrigation of the same to produce agricultural crops.)

Q. Mr. Bainbridge, how many acres of ground have you cultivated on your place?

A. About thirty acres.

Q. And what kind of crops have you growing there?

A. Alfalfa and grain, potatoes.

Q. What improvements have you on your land?

A. I have a house and barns, sheep-corral and horse-corral.

Q. If you are restrained from using any water until Morris and Howell obtain a supply, would it be possible for you to do any irrigating at all?

By Mr. McCONNELL: We object to that as irrelevant and immaterial.

502 A. During the high water I could still get some water.

Q. What time do you begin irrigating in the spring?

A. Usually about the end of April.

Q. How long does the irrigation continue?

A. Well, I can't get water at all after the middle of June.

Q. What improvements have you on your place, Mr. Bainbridge, on this one hundred and sixty acres?

A. Well, I don't understand; you mean in the way of houses?

Q. Yes, state what you have.

A. House and barns and fence and corrals, sheep-corrals, and ditches.

Q. Any orchard?

A. No, sir.

Q. What is the value of your improvements?

A. Oh, I suppose they would probably be worth fifteen hundred dollars, all the improvements.

Q. How many acres of land have you?

A. One hundred and sixty.

Q. And of this one hundred and sixty acres how many acres can you irrigate from Piney Creek, if you have sufficient water?

A. Well, probably about one hundred and thirty acres of it, because the creek runs through it and there is a good deal of

503 rough land along the creek, take out about twenty-five or thirty acres for that.

Q. How long have you irrigated with water?

A. I have irrigated a little since '96, but I only filed on water in 1900; I have used the water since '96.

Q. Are you acquainted with the measurement of water?

A. Well, I am no expert on it but I have seen water measured and have had chances to judge of measurement.

Q. How does the soil of your land compare in quality with the soil of these defendants' land, require more water or less or the same?

A. Well, it requires the same as the average land.

Q. How much water per acre would your land require to irrigate it successfully?

A. It would require about an inch to the acre.

Q. Have you ever made any appropriation of the waters of Piney?

A. Yes, sir.

Q. How have you diverted the water?

A. By taking a ditch out on each side of the creek; my land lies on each side of the creek and I have a ditch on each side.

Q. And which ditch did you build first?

A. Well, on the right bank of the creek looking down the creek.

504 Q. Well, which direction—to the east or west?

A. It's really on the north side of the creek.

Q. Well, what direction does the creek flow in its general course?

A. It flows not quite due west, little south of west.

Q. And how far above your place did you take out your ditch?

A. About half a mile above the ranch.

Q. When did you begin your work on this ditch?

A. In August, 1900. I think it was August the 25th, 1900.

Q. August 25th, 1900?

A. Yes, sir.

Q. And when did you complete the ditch?

A. Well, that ditch I completed in 1900.

Q. What's the size of it?

A. It's about two feet and a half on the bottom and probably averages a foot deep.

Q. And how deep will the water run in it?

A. I can run—oh, probably eight or nine inches all along.

Q. What's the fall of the ditch?

A. I don't know the exact fall of it.

Q. Do you know whether it has the fall of the country or not?

A. No, it hasn't the fall of the country.

Q. Now, you say you took out a second ditch?

505 A. Yes.

Q. When did you take out that?

A. The next spring.

Q. 1901?

A. Yes, sir.

Q. Which bank of the stream does that ditch tap?

A. The south bank.

Q. And how large is this ditch?

A. Well, it's about two-thirds the size of the other one.

Q. Carry about two-thirds the amount of water that the other one will?

A. Yes, sir.

Q. When did you begin the work on that ditch?

A. I began the work on it in 1900 but didn't complete the ditch until 1901.

Q. What time did you complete the ditch?

A. In the spring of 1901.

Q. Did you ever make any filing on the water?

A. Yes, sir.

Q. Have you got a certified copy of that filing with you?

A. Yes, sir.

Q. You may produce it.

(Witness produces paper.)

Q. State whether or not, Mr. Bainbridge, you ever posted a notice of your appropriation of the waters?

A. Yes, sir.

Q. When did you post the notice?

506 A. Just as soon as I got back from Red Lodge, I filed on the water and got a copy of that notice and posted it immediately.

Q. You posted the notice?

A. Yes, sir.

Q. Well, as to about what date?

A. About the 25th of August.

Q. You posted it about the 25th of August?

A. Yes, sir.

Q. Then had this filing made afterward?

A. No, sir; I had the filing made out and a copy of it made and came right home and posted it.

Q. You filed this first and then placed it afterwards?

A. Yes, sir.

Q. And what is the date you claim the water in this notice?

A. The 25th of August.

Q. 1900?

A. 1900.

Q. When did you say you began work?

A. On the ditch?

Q. Yes.

A. I began work immediately, about the 26th or 27th.

By Mr. PIERSON: We will offer the notice of water appropriation in evidence and asked that it be marked Defendants' Exhibit "E," and made a part of the witness Bainbridge's deposition.

By Mr. MCCONNELL: To which we object on the ground that the notice of appropriation as recorded does not comply with the
507 requirements of the statute.

(Paper marked Defendants' Exhibit "E.")

Q. Have your ditches been enlarged since the time of their construction?

A. No, sir, not materially.

Q. When did you first divert water on your land through your first ditch?

A. Through that ditch?

Q. Yes.

A. In 1900.

Q. Give us the day and month.

A. It was probably some time in October 1900; I don't know the date.

Q. Was it the forepart or the latter part, then?

A. About the middle.

About October 15th?

A. Yes, sir.

Q. When did you first divert water through your second ditch on your land from Piney Creek?

A. In May, 1901.

Q. What time in May?

A. About the middle of May.

Q. May 15th?

A. Yes, sir.

Q. Where are your headgates located with reference to being on

Government land? State whether or not they are on Government land.

A. They are on Government land.

Q. They are?

A. Yes, sir.

508 Q. They were there at the time you took out your ditches?

A. Yes, sir.

Q. State whether or not you have used the waters of Piney Creek continuously since the time you made your appropriation?

A. Yes, sir.

Q. To what use have you put it?

A. To irrigating my crops.

Q. Mr. Bainbridge, do you know whether or not Mr. Morris and Mr. Howell have any other sources of water supply, or will have, or any arrangement being made for them?

A. Only from hearsay; I understand that they can get water from a Government ditch which is being put through from the Shoshone River.

Q. Have you seen the survey of the ditch yourself?

A. Yes, sir; saw the stakes.

Q. Do you know whether or not they are preparing now to work on that ditch?

A. Yes, sir.

By Mr. McCONNELL: To all the foregoing questions and answers in reference to Howell and Morris getting water from a Government ditch, counsel for the plaintiff and for the intervenor objects and moves to strike the same out, for the reason that the same is irrelevant and immaterial, and the witness discloses the fact that he only knows of such arrangement by hearsay.

509 A. No, I know from my own knowledge that they are working on this ditch.

Q. Do you know of any work being done on this ditch?

A. Yes, sir. I know that they were putting a — up. I saw them put the — up, and where they were going to put the reservoir in at the head of the ditch.

Q. Mr. Bainbridge, have you any source of water supply other — on Piney Creek?

A. No, sir.

Q. Does this ditch, this Government ditch, pass your place?

A. No, sir.

Cross-examination.

(By Mr. McCONNELL:)

Q. You say you settled on the waters of Piney Creek in 1896?

A. Yes, sir; I settled on the land on Piney Creek.

Q. Were you acquainted with the ranches of Morris and Howell?

A. Not at that time.

Q. When did you first learn that they had water rights or claimed water rights out of Sage Creek?

A. I don't remember when I did first hear of their claims.

Q. Did you hear it the first season that you used water out of Piney Creek?

A. The first season that I used the waters?

510 Q. Yes.

A. Yes, sir; I guess I did.

Q. Did they ever make any demand of you for water?

A. No, sir.

DEFENDANT'S EXHIBIT "E."

Notice of Appropriation of Water Right.

STATE OF MONTANA,

County of Carbon, ss:

Know all men by these presents: That the undersigned did, on the 25th day of August, 1900, appropriate and claim, and does by these presents appropriate, locate and claim (5) Five Cubic Feet per second,* legal measurement, of the waters of Piney Creek, in the County of Carbon, State of Montana, and did, on the above named date, mark the point of intended diversion by posting there at a copy of this notice in a conspicuous place.

The said water is claimed for irrigation, and other useful and beneficial purposes, and the place of intended use is upon the ranch of said appropriator, on Piney Creek, Carbon County, Montana.

Said water is to be converted and conveyed to said place by means of a dam and two ditches, said ditches each to be 1½ feet
511 wide on bottom, 2 feet wide on top, and 1½ feet deep.

That the stream from which said diversion is to be made is more particularly described as follows, to wit: said ditches tap said creek upon both its right and left banks at a point about one mile below the head of said creek and about one-half mile above the ranch of said appropriator, and measured from the said point of diversion as an initial point, the following well known natural objects and permanent monuments are distant as follows, to wit: The head of said creek is distant one mile in a northeasterly direction; the said ranch of said appropriator is distant about ½ mile in a southwesterly direction.

And the undersigned hereby claims a right of way over all unappropriated lands of the United States through which said ditches shall pass, together with the right to repair and enlarge said ditches whenever and wherever the same may be necessary to convey the water hereby appropriated.

W. R. BAINBRIDGE,

Appropriator and Claimant.

Morris vs. Bean et al. Defendant's Exhibit "E," "H. L. W."

*A cubic foot of water per second of time is the legal standard for the measurement of water in Montana, and is equivalent to forty miner's inches, as measured by the standard formerly in force.

12 STATE OF MONTANA,
County of Carbon, ss:

W. R. Bainbridge, being first duly sworn for himself, says: That he is the appropriator and claimant named in the foregoing notice of appropriation; that he has read the said notice of appropriation, and knows the contents thereof, and that all matters and statements contained therein are true.

W. R. BAINBRIDGE.

Subscribed and sworn to before me this 25th day of August, 1900.

[SEAL.]

L. O. CASWELL,
Notary Public in and for Carbon County,
State of Montana.

[Endorsed:] Water Right Location. (Compared) W. R. Bainbridge, Piney Creek, Carbon County, State of Montana, County of Carbon, ss. I hereby certify that the within instrument was filed for record in my office on the 25th day of August, A. D. 1900, at 30 minutes past 11 o'clock A. M., and recorded on page 41 in Book 3 of Water Rights, Records of Carbon County, Montana. Attest my hand and seal of said county. E. J. McLean, County Recorder. By M. L. Newkirk, Deputy Recorder. [Seal.] Morris vs. Bean et al. Defendant's Exhibit "E" H. L. W.

Deposition of J. N. Bean (Recalled).—Direct Examination by Mr. Pierson.

J. N. BEAN, recalled.

(Examination by Mr. PIERSON:)

Q. Are you acquainted with the lands of Mr. Bainbridge?

A. Yes, sir.

Q. How many acres of land has Mr. Bainbridge which requires irrigation?

A. Well, sir; I think probably all of it. The creek runs through that would take some out, and then there would be possibly a little more.

Q. How many inches per acre would Mr. Bainbridge's land require?

A. Well, sir; I should judge it would require an inch or an inch and a half to the acre.

Q. Are you acquainted with Mr. Bainbridge's ditches from the time he took them out?

A. Yes, sir.

Q. When did he get water onto his lands from the first ditch which he constructed?

A. Well, I think it was in 1900 and possibly along in August or somewhere along there, I couldn't say exactly because I can't recollect the dates exactly; I know he filed—that is, he went to file that

summer in water and then went right to work and took his ditch out.

514 Q. Do you know of Mr. Bainbridge taking out a second ditch?

A. Yes, sir.

Q. When did he get water on his land through the second ditch?

A. The next spring.

Q. Give us the time.

A. Well, early spring, probably in May; I know that he had crop in and irrigated it there the next spring.

Q. Have these ditches been enlarged since?

A. Not to my knowledge, no, sir.

Q. State whether or not, Mr. Bean, these headgates and points of diversion to Mr. Bainbridge's land, to his ditches, are situate on public land?

A. Yes, sir; they are.

Q. On the public domain?

A. On the public domain, yes, sir.

Q. How many acres of crops has Mr. Bainbridge?

A. Well, he has thirty or forty acres; I couldn't say exactly.

Q. And what's the character of the crop?

A. There is some wild grass, some alfalfa and grain.

Q. How many acres of alfalfa?

A. I should judge about fifteen acres of alfalfa in.

Q. What improvements has Mr. Bainbridge on his place?

515 A. Mr. Bainbridge has a fence, has his land fenced; has houses and barns and corrals for both sheep and horses.

Q. What is the value of the improvements?

A. The improvements?

Q. Yes, sir.

By Mr. McCONNELL: We object to that as immaterial.

A. Some twelve or fifteen hundred dollars.

Q. Mr. Bean, do you know whether or not Piney and Sage Creek streams rise in Carbon County?

A. They both rise in Carbon County; yes, sir.

Q. Mr. Bean how many acres of land have you?

A. Under cultivation?

Q. No, all told?

A. Well, I have filed on three forties and I have one forty that unsurveyed yet that I have not filed on, is the fourth forty, make the hundred and sixty acres.

Q. Have you the fourth forty which is unsurveyed under your fence?

A. Yes, sir.

Q. Under fence?

A. Yes, sir.

Q. How long have you resided on this land?

A. I went there about the 26th of June, 1893.

Q. Where are these lands situate with reference to Piney Creek?

A. On both sides of Piney Creek near the head.

516 Q. And in what county?

A. Carbon County, Montana.

Q. State whether or not your lands can be irrigated from Piney Creek.

A. They can.

Q. I will ask you to state whether or not you have filed on the southeast quarter of the northeast quarter and the north half of the southeast quarter of section thirty-six, township eight south of range twenty-five east?

A. Yes, sir; I did.

Q. Have you ever exercised any other homestead filing than the description of this land as read to you?

A. No, sir.

Q. You are over the age of twenty-one years?

A. Yes, sir.

Q. Possessed of the right to make a homestead entry?

A. Yes, sir.

Q. For one hundred and sixty acres?

A. Yes, sir.

Q. Now, this one hundred and sixty acres of ground, how much of it is suitable for irrigation and requires irrigation?

A. Well, there is about one hundred and forty acres, I should think.

Q. How much of this one hundred and sixty have you irrigated?

A. Of this hundred and sixty I have irrigated about sixty acres.

517 Q. What kind of crops have you growing on your place?

A. I have alfalfa and timothy, grain, potatoes, garden and orchard.

Q. How many acres of alfalfa have you seeded and growing?

A. I have got about thirty-five or forty acres.

Q. How many acres of timothy have you seeded?

A. Well, the timothy and alfalfa is together.

Q. Thirty-five or forty acres?

A. Yes, sir.

Q. How many acres of grain do you raise?

A. Well, I generally raise about ten acres, something like that.

Q. How much of an orchard have you?

A. I have five acres in an orchard.

Q. Of what nature?

A. Apple trees, pear trees, plum trees.

Q. What other improvements have you on your place?

A. I have ditches, fences, corrals, barns and houses.

Q. What's the value of your improvements?

A. I think that the value of my improvements would be about two thousand dollars.

Q. Would it be possible for you to raise these crops and irrigate your orchard and grass if you were restrained from using any water until Morris and Howell received the water they are asking for?

518

A. No, sir, it would not.

Q. Did you ever appropriate any water for this land that you speak of?

A. Yes, sir, I did.

Q. What did you first do looking toward that appropriation of water?

A. The first thing — did I come to Billings here——

Q. Well, did you post any notice?

A. I posted the notice.

Q. Of the appropriation?

A. Yes, sir.

Q. Then you afterwards filed?

A. Yes, sir.

Q. How long between the time of posting your notice and the time of filing?

A. I posted the notice on the 29th of June I think, and I filed July 1st.

Q. How long after the time of your posting notice did you begin work on the ditch?

A. I commenced work within the next two or three days on the ditch.

Q. When did you complete the ditch?

A. I completed the ditch about the first of August.

Q. The same year?

A. The same year.

Q. What year?

A. '93.

Q. When did you turn the water on your land?

519 A. About the first of August.

Q. '93?

A. Yes, sir.

Q. How did the contents of the notice which you posted at the headgate compare with the one which you filed?

A. They were exactly the same.

Q. State whether or not you signed the notice that you posted?

A. At the headgate.

Q. Yes?

A. Yes, sir.

Q. Have you a copy of the notice which you filed?

A. Yes, sir, I have a copy of it.

(Produces paper.)

By Mr. PIERSON: We will ask that this instrument be marked as Defendants' Exhibit "F," and offer it as a part of the deposition of the witness J. N. Bean.

By Mr. McCONNELL: To which we object for the reason that it does not comply with the statute concerning water right notices.

Q. What time did you say you got the water on your land?

A. About the first of August, '93.

Q. And where did you file your notice of appropriation?

A. At the head of the ditch.

- Q. No, where did you file your notice, in what county?
A. In Yellowstone County.
- 520 Q. It was then a part of Yellowstone County?
A. It was then a part of Yellowstone County, yes, sir.
- Q. Describe the location of your headgate Mr. Bean?
A. My headgate is situated on unsurveyed land on the west bank, west and south bank of Piney.
- Q. How far is your headgate from the canyon on such stream?
A. It's located up there at a point of rocks just below the canyon.
- Q. Have you more than one ditch diverting the waters of Piney?
A. Yes, sir, I have two.
- Q. When did you construct your second ditch?
A. In the spring of '94, in April.
- Q. What time in April did you complete it?
A. I commenced work on it about the first of April and worked all through April on it and completed it the last of April.
- Q. When did you get water through the ditch?
A. I turned the water in the ditch on the last day of April.
- Q. 1894?
A. 1894, yes, sir.
- Q. Now, what is the size of the first ditch constructed by you?
A. The first ditch was four feet on top and a foot deep.
- Q. And what is the fall?
A. Well, it's the natural fall of the country.
- 521 Q. And what is the size of the other ditch?
A. The second ditch was three feet on top and a foot deep.
- Q. State whether or not the points of diversion of your ditches from Piney Creek are located on government land?
A. Yes, sir.
- Q. State how you have used the water since the time of your appropriation?
A. I have used it for irrigating purposes.
- Q. Has that use been continuous?
A. Yes, sir, been continuous.
- Q. Have you been interrupted by anyone?
A. No, sir.
- Q. State whether or not, Mr. Bean you have used this water jointly with anyone else?
A. No, sir.
- Q. Have you used this water under any agreement or concerted action with any other of the defendants?
A. No, sir.
- Q. Asserted your right as an individual right?
A. Yes, sir.
- Q. Have you used this water at all times during the irrigating season?
A. Yes, sir.
- Q. Have you any other source of water to irrigate your ranch other than from Piney Creek?
A. No, sir.
- 522 Q. Now what time in the year do you begin irrigation?
A. About the—well in April—about the 15th of April as a general thing.

Q. And how late does the irrigating season continue?

A. Well, I generally irrigate until it freezes up, until I can't run the water.

Q. Do you know of the plaintiff and petitioner William A. Morris and the intervener Howell having other sources of water supply?

A. Well, nothing more than only what I have been told; I have seen stakes of the Government ditch above Morris' ranch in Montana, come around across the line there.

Q. Do you know whether or not they are working on that ditch?

A. I think that they were.

Q. You don't know that they were?

A. I don't know it; no, sir.

By Mr. McCONNELL: We move to strike out everything except that he saw some stakes.

Cross-examination.

(By Mr. McCONNELL:)

Q. You only know what these stakes are there for by hearsay?

A. Yes, sir.

By Mr. McCONNELL: We move to strike that out.

523

DEFENDANTS' EXHIBIT "F."

STATE OF MONTANA,

County of Yellowstone, ss:

To All Whom These Presents may Concern: Be it known, that I, Jordan N. Bean, in the County of Yellowstone and State of Montana do hereby declare and give notice to all persons concerned that I have appropriated three hundred (300) inches of the waters of Piney Creek in the County of Yellowstone, State of Montana, for useful and beneficial purposes, and I do further declare as follows:

First. That I do hereby claim three hundred inches of the water of Piney Creek according to the standard measure of water prescribed by Section 1262 of Chapter LXXIV of the Fifth Division of the General Laws Compiled Statutes of Montana.

Second. That the purpose for which said water is claimed is for irrigating purposes and especially for irrigating the land claimed occupied and possessed by me and situated on both banks of said Piney Creek, said land being unsurveyed, which is the place of intended use.

Third. That said waters are diverted from said stream by means of a ditch tapping said stream upon its north bank at a point thereon situate and designated by a point of rocks near the canyon
524 and running thence in a westerly direction to and upon the above-described land; that the size of said ditch is — inches in width at the bottom thereof and — inches across the top thereof by — inches in depth.

Fourth. That said appropriation made upon the 29th day of June A. D. 1893.

Fifth. That the name of the appropriator of said water is Jordan N. Bean.

And I do hereby further claim the right to change the place of diversion of said water at any time, and to extend the ditches, flumes, piles and aqueducts by which said diversion is made from time to time to any place other than where first used and to use the waters for other useful or beneficial purposes than that for which it was first appropriated.

And I also claim all the rights of way for ditches, flumes, aqueducts and reservoirs, dikes and canals over and across the lands through which they are constructed, and the right to enlarge and alter the same from time to time; and also all rights, easements, privileges and appurtenances thereunto belonging or granted under and by virtue of all laws both State and National.

Together with all and singular the hereditaments and appurtenances thereunto belonging or appertaining or to accrue to the same.

525 In witness whereof, I have hereunto set my hand and seal this 29th day of June, A. D. 1893.

JORDAN N. BEAN.

STATE OF MONTANA,

County of Yellowstone, ss:

Jordan N. Bean, being duly sworn, deposes and says that he is of lawful age and the locator and appropriator of the waters and water right in the foregoing notice of water appropriation named; that he has read the foregoing notice of appropriation and knows the contents thereof that the matters and things contained in said notice are true.

JORDAN N. BEAN.

Subscribed and sworn to before me this 30th day of June, A. D. 1893.

[SEAL.]

HENRY BURTON,

Notary Public.

Filed for record this 1st day of July, A. D. 1893, at 4:30 o'clock — M. U. E. Frizelle, County Recorder. By Henry Burton, Deputy.

Certificate.

STATE OF MONTANA,

County of Carbon, ss:

I, G. L. Finley, County Clerk and Recorder in and for said County and State, do hereby certify that the annexed instrument of
526 writing is a full, true and correct copy of Water Right as appears from the original on file and indexed in Vol. 1, of Water Right, on page 527, Records of said Carbon County, and that the same was filed on the first day of July, 1893, at 4:30 o'clock P. M.

In testimony whereof, I have hereunto set my hand and affixed the seal of said County, at my office in Red Lodge, Montana, this, the 30th day of August, A. D. 1904.

G. L. FINLEY, *County Clerk*.

[Endorsed:] Morris vs. Bean. Defendant's Exhibit "F." H. L. W.

Deposition of Corbett Bennett (Recalled).

Direct examination by Mr. PIERSON.

CORBETT BENNETT.

(Examination by Mr. PIERSON:)

Q. Mr. Bennett, are you acquainted with the ranch of J. N. Bean?

A. Yes, sir.

Q. How long have you known it?

A. Well, ever since he has been there I have been familiar with the place; I have been there off and on.

Q. Have his ditches been enlarged since they were first constructed?

A. Not that I know of.

Q. How many acres of ground has Mr. Bean that requires irrigation?

527 A. Well, all of it requires irrigation to raise anything.

Q. How many acres has he that he can irrigate from his ditches.

A. Well, I don't know exactly; but practically all of it. Of course, the corrals and a few little patches out of that.

Q. Well, fix the acreage.

A. Well, one hundred and forty at least, out of the hundred and sixty could be irrigated.

Q. What crops has Mr. Bean growing on his land?

A. He has a meadow consisting of timothy and alfalfa; he has an orchard; he raises grain, potatoes and so on.

Q. How many acres of grain does he usually raise or has he plowed or cultivated?

A. Well, I should judge there was somewhere over forty or fifty acres under cultivation, all told.

Q. What other improvements has Mr. Bean on his ranch?

A. He has his place fenced; has a house, barns, corrals, etc.

Q. Are you acquainted with the value of these improvements?

A. Yes, sir.

Q. What would you say was the value of Mr. Bean's improvements?

528 A. Well, I should estimate that they was worth between fifteen hundred and two thousand dollars, at least.

Q. Mr. Bennett, you are one of the defendants in this action?

A. Yes, sir.

Q. When did you locate on your ranch on Sage Creek?

A. On the first of May, '99.

Q. Of whom did you obtain possession and obtain the land, if anyone.

A. I bought it of Mr. Erickson.

Q. O. S. Erickson?

A. O. S. Erickson.

Q. And state whether or not it was unsurveyed land?

A. It was unsurveyed land at that time.

Q. Did you obtain any writings at that time?

A. No, I didn't; it was simply a squatter's right that he had, and he moved off, and I moved on.

Q. State whether or not he turned over the ditch and water right to you?

A. Yes, sir.

Q. Do you know who had this place prior to Mr. Erickson?

A. Yes; Joseph Graham.

Q. And as to Mr. Graham, do you know of his turning this place over to Mr. Erickson?

A. Yes, sir.

Q. Were there any writings between Graham and Erickson?

529 A. No, there was no writings between them; it was unsurveyed land; he paid him so much for the improvements and gave him possession.

Q. Do you know of Mr. Graham giving possession to Erickson?

A. Yes.

Q. Did that include the ditch and water right?

A. Yes, sir.

Q. I will ask you to state whether or not at the time of the commencement of this suit you had a homestead filing on the northwest quarter of the southeast quarter, and the east half of the southwest quarter, and the southwest quarter of the northwest quarter of section seven, in township eight, south, of range twenty-five east?

A. Yes, sir.

Q. Was this land situated in Carbon County, Montana?

A. Yes, sir.

Q. You have, since the bringing of this action, proved up on the land?

A. Yes.

Q. Where is this land situate with reference to Sage Creek?

A. It is on Sage Creek; Sage Creek runs nearly through the center of the place.

Q. Can it be watered from Sage Creek?

A. Yes.

Q. How many acres of this hundred and sixty acres can be irrigated from Sage Creek from the ditches now on the place?

530 A. Practically all of it; at least one hundred and forty acres of the hundred and sixty.

Q. How many acres of crop are there on this place?

A. There was about thirty acres of timothy and alfalfa, and the

balance of it—a little pasture—the balance of it is natural wild grass.

Q. Do you irrigate the wild grass?

A. Yes.

Q. How many acres have been irrigated on your place?

A. Well, there has been all of a hundred and twenty acres that I have irrigated.

Q. Have you any source of water supply other than Sage Creek for the purposes of irrigation?

A. No, sir.

Q. What other improvements have you on the place other than the house?

A. There is a five-room house; the place is fenced all around, barns, corrals, sheds, etc.

Q. What would be the value of the improvements on your land?

A. Well, two thousand dollars, at least.

Q. State whether or not, Mr. Bennett, the waters of Sage Creek have ever been diverted to your lands?

A. Yes, sir.

Q. How?

A. By means of dams, ditches and flumes.

531 Q. What's the size of the ditch?

A. The ditch is about three feet in width, with an average depth of about two feet.

Q. Do you know the fall of the ditch?

A. I do not.

Q. State where your headgate is situate; describe its location.

A. Well, I couldn't give you the numbers exactly; it's located on a piece of land above my place belonging to Mr. Bent—S. M. Bent.

Q. You state in the pleading that your ditch taps the east bank of the stream?

A. Yes, sir.

Q. Is it at a point on the northeast quarter of the northwest quarter of section seven, township eight south of range twenty-five east?

A. Yes—as I said before, I don't know the exact number of the land to describe the ditch and dam, etc.; it's on the upper part of section seven, I know that, just on the edge of it.

Q. And state whether or not this ditch is in Carbon County?

A. Yes, sir.

Q. The ditches of all of these defendants?

A. They are all—

Q. In Carbon County?

A. Yes, sir.

Q. Where is your point of diversion located in reference to being on Government land?

532 A. It's not on Government land now; it's on a piece of land belonging to Mr. Bent.

Q. At the time the ditch was taken out, what can you say as to where it was then?

A. It was on unsurveyed land at that time.

Q. On Government land?

A. Yes, sir; unsurveyed Government land.

Q. What use have you made of this water since the time you appropriated it?

A. Used it to irrigate with, raising hay, grain, potatoes, etc.

Q. Has that use been continuous?

A. Yes, sir.

Q. State whether or not you have been interrupted in any way in the use of the water.

A. No, sir.

Q. In your use of this water, Mr. Bennett, state whether or not anyone else has been interested with you in diverting the water, or have you diverted it as an individual?

A. I have diverted it as an individual.

Q. Has there been any concerted action on your part with any other person on the stream as to the diversion of the water?

A. No, sir; there has not.

Q. Are you acquainted with the survey of the Government ditch taken from the Stinkingwater River?

533 A. Yes, sir; at the time we were down to Mr. Morris' and

Mr. Howell's ranch we seen the line of survey, the stakes.

Q. State whether or not this line of ditch covers Mr. Morris' and Mr. Howell's places.

A. Yes, sir; it comes in above both their places.

Q. And do you know whether or not the Government is now working on this ditch?

A. Yes, sir; I was up there——

By Mr. McCONNELL: We object to that as irrelevant and immaterial.

(Question repeated.)

A. Yes, sir; they are.

Q. Do you know whether or not a filing was made on your water right?

A. Yes, sir.

Q. Have you got a copy of it?

A. Yes, sir; I have it here.

(Witness produces paper.)

By Mr. PIERSON: We would ask that this instrument be marked as Defendants' Exhibit "G," and offer it as a part of the witness Bennett's testimony.

(Marked Defendants' Exhibit "G.")

(It is here admitted by counsel in the case that if the witness Joseph Graham were present, he would testify that he posted the notice of appropriation at the point of intended diversion
534 on the 3d day of July, 1893, in form and substance as the recorded notice, and that he began work on said ditch within twenty days from the date of such posting and prosecuted the construction of the same with reasonable diligence until completion, and that this agreement shall be used and read on the hearing the

same as the deposition of said Joseph Graham would be used if he had testified in the case.)

Q. Mr. Bennett, are you acquainted with the ranches of Wallace Bent and Bert Bent?

A. Yes, sir.

Q. Where are they situate with reference to Sage Creek?

A. Sage Creek runs through both their places.

Q. Taking up the matter of these ranches, how long have you known both of the ranches?

A. Well, I have known them ever since they were first located, when that strip was thrown open.

Q. When was that?

A. In October, '92.

Q. Do you know who first located the Wallace Bent ranch?

A. Yes, sir; John Widman.

Q. And do you know who located the Bert Bent ranch?

A. Yes, sir; a man by the name of Huntley—Abe Huntley.

535 Q. How many acres was there in the Wallace Bent ranch?

A. One hundred and sixty.

Q. And of that one hundred and sixty acres, how many acres of it is tillable land and requires irrigation?

A. It all requires irrigation to produce a crop.

Q. How many acres of it can be irrigated from Sage Creek with the ditches Mr. Wallace Bent now has?

A. Well, practically all of it; there is a high ridge along the west edge of it; I don't know how much, a few acres, that it would not be practicable to put water on.

Q. Well, tell us the acreage?

A. Well, somewhere from a hundred and forty to a hundred and fifty acres.

Q. What kind of crops and how much has Mr. Wallace Bent growing on his place?

A. He has nearly all of it in hay of different kinds, wild hay and alfalfa; he raises a good many potatoes every year, probably ten to fifteen acres.

Q. How many acres of alfalfa?

A. From thirty to thirty-five, I should judge.

Q. And as to his wild hay, state whether or not it is irrigated?

A. Yes, it has to be irrigated.

536 Q. What other improvements has Mr. Wallace Bent on his place?

A. He has a house, stables, corrals; his place is fenced; he has two houses on his place.

Q. You are acquainted with the value of the improvements on Wallace Bent's place?

A. I should judge that he has at least two thousand dollars' worth of improvements on the place.

Q. Now, as to Mr. Bert Bent's place, how many acres of his land requires irrigation?

A. It all requires irrigation.

- Q. How many acres of this land can be irrigated from Sage Creek?
A. Every foot of it, with the exception of what is taken up by the creek running through it.
- Q. How many acres?
A. Two or three acres, I should judge.
- Q. Then you would say one hundred and fifty-seven acres, or thereabouts?
A. Well, a hundred and fifty-five or a hundred and fifty-seven acres.
- Q. How much of a crop has Mr. Bert Bent raised?
A. Well, most of his is in hay, wild hay.
- Q. That is Bert Bent?
A. Yes, sir; he has some alfalfa.
- Q. How many acres of wild hay?
A. Well, he has at least one hundred acres of wild hay.
- Q. And how many acres of alfalfa?
A. Something near from thirty-five to forty.
- Q. Raise any grain?
A. He has a few acres in grain; I don't know just how much.
- Q. Are you acquainted with the improvements on Mr. Bert Bent's place?
A. Yes, sir.
- Q. What do they consist of?
A. He has the fence placed, has corrals, sheep-sheds, cattle-sheds, tables, etc.
- Q. What is the value of the improvements on Mr. Bent's place?
A. Oh, from two thousand to twenty-five hundred dollars.
- Q. I don't know as you described the improvements on Mr. Wallace Bent's place?
A. I think I did; I said he had two houses, corrals, etc., stable and fence.
- Q. State whether or not Mr. Bert Bent and Wallace Bent have a joint ditch appropriating the waters of Sage Creek?
A. Yes, sir; they both take their water out of the same ditch.
- Q. And how long have you known that ditch?
A. Since it was first located.
- Q. Which bank of the stream does this joint ditch tap?
A. It taps the east bank of the creek.
- Q. How far above the ranch of Wallace Bent?
A. Oh, three or four hundred yards, I should say; just a short ways.
- Q. How far is it from the old Bridger trail crossing?
A. Well, it is near the old Bridger trail, perhaps, well, it is just about the same distance from the old Bridger trail, that ran right along the corner of his place, three or four hundred yards, I should judge.
- Q. Mr. Bennett, has that ditch been enlarged since it was first constructed?
A. No, sir.
- Q. Who first took out this joint ditch?
A. Widman and Huntley.

Q. That's Abraham L. Huntley?

A. Yes, sir.

Q. Who, then, had Bert Bent's place?

A. Yes, sir.

Q. And John Widman, who then had Wallace Bent's place?

A. Yes.

Q. You mean Huntley and Widman?

A. Huntley and Widman.

Q. State whether or not the point of diversion of this ditch was made on the public domain?

A. It was made on unsurveyed land.

539 Q. Government land?

A. Yes, Government land.

Q. Do you know of the original claimants Huntley and Widman posting a notice of appropriation?

A. Yes, sir.

Q. Do you know about what time they posted that notice?

A. Yes, sir, it was—well, sometime towards the last of October, sometime from the 20th to the last; I couldn't give the date exactly.

Q. And how long after they posted the notice did they begin to work on their ditch?

A. Well, they commenced work at once; they came to my place and got a spade and something else to work with.

Q. That's in October?

A. That was in October, '92.

Q. When did they complete the ditch?

A. They completed it that fall.

Q. About what time?

A. Well, I couldn't state exactly; I left there about the middle of November and they had it done just shortly before I left.

Q. They completed it that fall?

A. They completed it between that time and the middle of November; it's a short ditch.

540 Q. Has this ditch been enlarged, Mr. Bennett, since the time it was first constructed by Huntley and Widman?

A. No, sir, not more than the cleaning out of the natural stuff; there has never been any enlargement made.

Q. And about what time was the water turned down on their ranches?

A. Well, they had water in their ditch when I left there in November, the middle of November, '92.

By Mr. PIERSON: Defendants now offer certified copy of the notice of water right appropriation of Abraham L. Huntley and John Widman and request that it be marked Defendants' Exhibit "H" and made a part of the witness Bennett's deposition.

(No objection.)

(Marked as requested.)

Q. State where this water ran when it was diverted in October, 1892.

A. It ran down on these ranches of Widman and Huntley, the places that Bert Bent and Wallace Bent own now.

Q. How long did it continue to run there?

A. Well, it was running there when I left there the middle of November, and it's been running there ever since, I guess.

Q. When did you next return to the place?

441 A. Well, the next summer; I was through there in the spring again but I wasn't down to that ditch; I crossed in above there, but that next summer I was down there in the irrigating season.

Q. Water still running then?

A. Yes.

Q. Now, as to this ditch, Mr. Bennett; in the fall of '92 how much and what proportion of the waters of Sage Creek did the Huntley and Widman ditch divert?

A. Well, it was nearly all taken out; there was a little left in the creek but it was nearly all taken out.

Q. Well, how much?

A. Oh, on an estimate there was somewhere from two to three hundred inches.

Q. Taken out?

A. Taken out.

Q. Well, now, what we are after is as to how much there was left in the creek.

A. Well, there wasn't a fourth as much left in the creek as there was taken out; just a very small amount left in the creek.

Q. Mr. Bennett, is there any source of water supply other than Sage Creek to irrigate these two ranches belonging to Mr. Wallace and Mr. Bert Bent?

A. No, sir.

Q. You spoke, when you were on the stand this morning, about a spring rising near your place?

A. It's right on my place there, is the spring.

542 Q. Does it rise where you can use it to irrigate?

A. No, I could not irrigate with it.

Q. The water flows on down?

A. Yes, it's just one of several—well, you might say a group of springs in there near that; just furnishes enough water for house use.

Q. Do these springs flow for any distance in Sage Creek?

A. Well, if there was no other water running in Sage Creek excepting these springs they wouldn't get a quarter of a mile.

Q. Are any of the defendants residing below you on the stream, or, in other words, are you the lowest appropriator on Sage Creek of any of the five defendants who appear here?

A. Yes, sir.

Q. You are the lowest?

A. Yes, sir.

Q. Well, are there any other defendants below you?

A. Well, I don't think there are that are represented; there are men below; there are Allen Graham, Mr. Ealy and Mr. Adams.

Q. Mr. Adams is not a party to this suit?

A. No.

Q. Is Ealy a party to the suit?

A. Yes.

Q. You say this water if left alone would not flow but a short distance?

543 A. No, if there was no other water coming down the creek these springs would disappear in a little ways.

Q. You say in a quarter of a mile?

A. Yes.

Q. So far as you know this water on the Bent place has been used continuously?

A. Yes, sir.

Q. Without any interruption?

A. Yes, sir.

DEFENDANTS' EXHIBIT "G."

Notice of Water Right of Joseph H. Graham.

STATE OF MONTANA,

County of Yellowstone, ss:

To all Whom These Presents May Concern: Be It Known, that I, Joseph H. Graham, a citizen of the United States of lawful age, of Pryor Creek Postoffice, in the County of Yellowstone, and State of Montana, do hereby declare and give notice to all persons concerned, that I have appropriated two hundred and eighty-eight (288) inches of the waters of Sage Creek and of the two certain springs flowing into said creek and hereinafter more particularly described for useful and beneficial purposes; the said Sage Creek being a tributary of the Stinkingwater River and being together with said

544 springs in the County of Yellowstone and State of Montana. and the said waters hereby appropriated being all of the unappropriated waters of said Sage Creek and all of the waters of said springs. Each of said springs is situated upon that certain tract of unsurveyed land which from the latter part of October, A. D. 1892 until recently was used, possessed, occupied, claimed and enjoyed by one John Widman as a homestead claim. One of the said springs being commonly known as the "Big Spring" and being situate about fifty (50) feet east of the east bank of said Sage Creek and the waters thereof flowing into said creek at a point thereon situate about one-half ($\frac{1}{2}$) mile above the point of diversion of my irrigating ditch, hereinafter described. The other of said springs being situate at a point about four hundred and fifty feet (450) west of the west bank of said Sage Creek and the waters thereof flowing into said creek at a point thereon situate about one-quarter of a mile above the point of diversion of my said irrigating ditch; and all of the waters of each of said springs flowing into and joining the waters of said Sage Creek as above set forth and flowing down the channel of said creek to the point of diversion of my said ditch.

And I do further declare as follows:

First. That I do hereby claim two hundred and eighty-eight (288) inches of the waters of said Sage Creek and of said springs according to the standard measure of water prescribed by section 1262 of Chapter 74 of the General Laws, compiled Statutes of Montana.

Second. That the purpose for which said water is claimed is for irrigating and other legal purposes and especially for irrigating that certain tract of unsurveyed public land situated in the valley of said Sage Creek at a point about four miles south of the south line of the Crow Indian Reservation and which now is and since the 5th day of May, A. D. 1893, has been used, occupied, claimed and assessed and enjoyed by me as a homestead claim which is the place of intended use.

Third. That said waters are diverted from said stream by means of a dam and a ditch tapping said stream upon its east bank at a point thereon situate near the center of the diverting line between the ranches or homestead claims now and for some time past, used, claimed and occupied respectively by Abraham Huntley, and Marshal Huntley, and running thence for a distance of about 3300 feet in a southerly direction across the land of Abraham Huntley, to the north east corner of my land and running thence to and upon and over the above described place of intended use; that the size of said ditch is about twenty-two (22) inches in width at the bottom thereof and about thirty-six (36) inches across the top thereof by about twenty (20) inches in depth.

Fourth. That said appropriation was originally made upon the twenty-ninth (29th) day of May, A. D. 1893, and was renewed by posting a copy of this notice at the head of said ditch on the third day of July, A. D. 1893.

Fifth. That the name of the appropriator of said water — Joseph H. Graham.

And I do hereby further claim the right to change the place of diversion of said water at any time and to extend the ditches, flumes, dikes, and aqueducts by which said diversion is made from time to time to any place other than where first used and to use the waters for other useful and beneficial purposes than that for which it was first appropriated.

And I also claim all the rights of way for ditches, flumes, aqueducts and reservoirs, dikes and canals over and across the lands through which they are constructed and the right to enlarge and alter the same from time to time; and also all rights, easements, privileges and appurtenances thereunto belonging or granted under and by virtue of all laws, both State and National.

Together with all and singular the hereditaments and appurtenances thereunto belonging or appertaining or to accrue to the same.

In witness whereof, I have hereunto set my hand and seal this sixth day of July, A. D. 1893.

JOSEPH H. GRAHAM. [SEAL.]

STATE OF MONTANA,

County of Yellowstone, ss:

Joseph H. Graham, being duly sworn, deposes and says that he is of lawful age and the locator and appropriator of the waters and water right in the foregoing notice of water appropriation named that he has read the foregoing notice of appropriation and knows the contents thereof; that the matters and things contained in said notice are true.

JOSEPH H. GRAHAM.

Subscribed and sworn to before me this 6th day of July, 1893.

[SEAL.]

U. E. FRIZELLE,

Co. Clerk.

Filed for record July 6th, A. D. 1893, at 2:05 P. M. U. E. Frizelle, County Recorder.

548

Certificate.

STATE OF MONTANA,

County of Carbon, ss:

I, G. L. Finley, County Clerk and Recorder in and for said County and State, do hereby certify that the annexed instrument of writing is a full, true and correct copy of Water Right Appropriation and appears from the original on file and indexed in Vol. 1 of Water Right on page 631 Records of said Carbon County, and that the same was filed on the 6th day of July, 1893, at 2:05 o'clock P. M.

In Testimony whereof, I have hereunto set my hand and affixed the seal of said county, at my office in Red Lodge, Montana, this the 30th day of August, A. D. 1904.

G. L. FINLEY,

County Clerk.

[Endorsed:] Morris vs. Bean et al. Defendants' Exhibit "G."
H. L. W.

DEFENDANTS' EXHIBIT "H."

Notice of Water Right of Abraham L. Huntley and John Widman

To all Whom These Presents May Concern: Be it known, that we
Abraham L. Huntley and John Widman, of the County of
549 Yellowstone and State of Montana, do hereby declare and
give notice to all persons concerned that we have appropriated
500 inches of the waters of Sage Creek in the County of Yellowstone
and State of Montana, for useful and beneficial purposes. And do
further declare as follows:

First: That we do hereby claim 500 inches of the waters of said
Sage Creek according to the standard measurement of water pre

cribed by section 1262 of Chapter 74 of the Fifth Division of the General Laws, compiled statutes of Montana.

Second: That for the purposes for which water is claimed is for irrigating purposes and especially for irrigating 320 acres of land belonging to us, said land lying and being situate on both sides of Sage Creek and extending on both sides of said creek down said stream the distance of two miles and containing 320 acres of land, which is the place of intended use.

Third: That said waters are diverted from said stream by means of a dam and ditch tapping said stream upon its east bank at a point thereon situate about 300 yards above where said Bridger Road crosses and intersects said Sage Creek, and running thence in a southeasterly direction to and upon the above described lands; that the size of the said ditch is thirty-six inches in width at the bottom thereof, and seventy-two inches across the top thereof by twenty-four inches in depth.

Fourth: That said appropriation is made upon the 28th day of October, A. D. 1892.

Fifth: That the names of the appropriators of said water are Abraham L. Huntley and John Widman.

We do hereby further claim the right of way to change the place of diversion of said water at any time, and to extend the ditches, flumes, *ditches*, piles and aqueducts by which said diversion is made from time to time to any other place other than where first used and to use the waters for other useful purposes than that for which it was first appropriated.

And we also claim all the rights of way for ditches, flumes, aqueducts and reservoirs, dikes, and canals over and across the lands through which the same are constructed and the right to enlarge and alter the same from time to time, and all rights and easements, privileges and appurtenances thereunto belonging or granted under and by virtue of laws both State and National.

Together with all and singular the hereditaments and appurtenances thereunto belonging or appertaining or to accrue to the same.

In Witness Whereof, we have hereunto set our hands and seals this 31st day of October, 1892.

ABRAHAM L. HUNTLEY,
JOHN WIDMAN.

(Exhibit "H-2" H. L. W.)

STATE OF MONTANA,

County of Yellowstone, ss:

Abraham L. Huntley and John Widman, being first duly sworn, depose and say each for himself and not one for the other, that he is of lawful age and the locators and appropriators of the waters and water right in the foregoing notice of appropriation named; that he has read the foregoing notice of appropriation named and knows the contents thereof; that the matters and things contained in said notice are true.

ABRAHAM L. HUNTLEY,
JOHN WIDMAN.

Subscribed and sworn to before me this 31st day of October, 1892
WM. McMORRIS, J. P.

Filed for record the 1st Nov. A. D. 1892, at 9.45 o'clock A. M.
Fred H. Foster, County Recorder. Henry Burton, Deputy.

552 STATE OF MONTANA,
County of Carbon, ss:

I, County Clerk and Recorder in and for said county and State, do hereby certify that the annexed instrument of writing is a full, true and correct copy of water right as appears from the original on file and indexed in Vol. 1 of Water Rights on page 581, Records of said Carbon county, and that the same was filed on the 1st day of November, 1892, at 9:45 o'clock A. M.

In testimony whereof, I have hereunto set my hand and affixed the seal of said county, at my office in Red Lodge, Montana, this the 30th day of August, A. D. 1904.

[SEAL.]

G. L. FINLEY,
County Clerk.

[Endorsed:] Morris vs. Bean et al. Defendant's Exhibit "H."

Deposition of Wallace Bent (Recalled)—Direct Examination by Mr. Pierson.

WALLACE BENT.

(Examination by Mr. PIERSON:)

Q. Mr. Bent, you are one of the defendants in this action?

A. Yes, sir.

Q. Where is your land located with reference to Sage Creek?

553 A. It's right on Sage Creek; Sage Creek runs through it.

Q. Are you the owner of the land?

A. Yes, sir.

Q. State whether or not you are the owner of the west half of the northeast quarter of section six, township six south of range twenty-five east, and the west half of the southeast quarter of section thirty-one, township seven south of range twenty-five east, in the county of Carbon, State of Montana.

A. Yes, sir, I am.

Q. You are the owner of said land?

A. Yes, sir.

Q. How long have you owned this land?

A. I took the land in '93.

Q. Of whom did you obtain it?

A. Frank Shields.

Q. What time of the year did you obtain possession?

A. The 27th day of November, '93.

Q. State whether or not at the time you obtained possession of

this hundred and sixty acres of land, you also obtained possession of the water and water right.

A. Yes, sir.

Q. Have you the deed with you?

A. Yes, sir, I think I have, certified copy.

(Witness produces paper.)

554 Q. You are acquainted with the contents of this deed, are you?

A. Yes, sir.

Q. I will ask you to state whether or not the lands which are mentioned in this deed are the lands which Mr. Shields turned over to you at the time.

A. They are, yes, sir.

Q. And as to the water right and ditch which is described, state whether or not he turned those over to you at the time?

A. He did.

Q. This deed which I hold was received by you from Mr. Shields, was it?

A. Yes, sir.

By Mr. PIERSON: We now offer a certified copy of the deed from Frank A. Shields to Wallace Bent and S. W. Bent, and ask that it be marked Defendants' Exhibit "I," and made a part of the deposition of Wallace Bent.

(Paper marked as requested.)

Q. Do you know of whom Mr. Shields obtained this hundred and sixty acres of land?

A. Yes, sir.

Q. And the water right and ditch?

A. Yes, sir.

Q. Of whom?

A. John Widman.

Q. Have you a deed from John Widman to Frank Shields?

A. Yes, sir.

Q. You may produce it.

(Witness produces paper.)

555 Q. Are you acquainted with the description of the land described in this John Widman deed?

A. Yes, sir.

Q. State whether or not this is the land which you now occupy.

A. It is, yes, sir.

Q. And as to the ditch and water right mentioned in this deed, state whether or not that is the same ditch and water right which you now have?

A. It is, yes, sir.

By Mr. PIERSON: We now offer the deed from John Widman to Frank A. Shields in evidence and ask that it be marked as Defendants' Exhibit "J," and made a part of the witness, Wallace Bent's deposition.

(Marked as requested.)

Q. Mr. Bent, has this ditch been enlarged since you became acquainted with it in '93?

A. No, sir, it has not.

Q. What is the size of it?

A. The size of the headgate is forty inches wide and six inches high.

Q. State whether or not the ditch is of sufficient capacity to carry the water coming through the headgate under a six inch pressure?

A. It is, yes, sir.

556 Q. And state whether or not this ditch has been used jointly by yourself and your brother, Bert Bent, since he owned his place?

A. It has, yes, sir.

Q. And state whether or not it was used jointly by yourself and A. L. Huntley prior to the time that your brother bought Huntley's place?

A. It was, yes, sir.

Q. How many acres of crop have you on your place?

A. I have about a hundred and ten acres.

Q. What kind of crop?

A. Alfalfa, timothy, wild grass, and I raise grain and potatoes besides.

Q. And what other improvements have you on the land?

A. I have corrals, stables, cellars, fences, couple of houses, etc.

Q. What's the value of your improvements?

A. Oh, couple of thousand dollars, I guess; something like that.

Q. State how much of your land requires irrigation and that you can irrigate from Sage Creek with the ditch you now have?

A. About one hundred and twenty-five acres.

557 Q. State, Mr. Bent, how much land on your brother's place, Bert Bent, can be irrigated and requires irrigation from this stream?

A. All excepting where his house and barns stand and what little the creek takes up.

Q. Give us the acreage.

A. Probably five acres.

Q. Mr. Bent, state whether or not the waters of Sage Creek have been appropriated by yourself and your predecessor in interest, and your brother and his predecessor in interest, continuously since you have known the place.

A. They have, yes, sir.

Q. What amount of water have you conducted through this ditch during the irrigating season, that is, you and your co-owner in the ditch?

A. We have used two hundred and twenty-five inches.

Q. Two hundred and twenty-five?

A. Yes, sir.

Q. State whether or not when you used this two hundred and twenty-five inches during the irrigating season water flowed by your headgate or did it take all the creek.

A. It took all the water that come to our headgate.

Q. And have you used that water continuously since 1893?

A. Yes, sir.

558 Q. State whether or not in the use of this water, it's been by concerted action with your neighbors, or whether you and the persons interested with you in the ditch have diverted it by yourselves without respect to the rights of others.

A. We have diverted it by ourselves without respect to the rights of others.

Q. And as I believe you stated before, you have not turned any water down to William Morris; that condition has existed ever since you knew anything about the place?

A. Yes, sir.

Q. Has anyone ever interfered with you in the use of this water?

A. They have, yes, sir.

Q. Interfered with you? Has Mr. Morris ever interfered with you?

A. No, sir.

Q. Has Mr. Howell ever interfered with you in the use of this water?

A. No, sir.

Q. Has Mr. Howell ever interfered with your brother in the use of this water?

A. No, sir.

Q. And Mr. Bent, who was your brother Bert Bent's predecessor in interest?

A. Abraham L. Huntley.

Q. Is Abraham L. Huntley the man who signed and filed the notice of appropriation and made the appropriation of the water?

A. Yes, sir.

559 Q. And this man, John Widman, that you spoke of, who deeded to Frank Shields, is Widman the person who made the original appropriation?

A. Yes, sir.

Cross-examination.

(By Mr. McCONNELL:)

Q. I will ask you if William A. Morris had not demanded of you to turn water down to him?

A. No, sir, he has been up there in that country to see about getting water but he never demanded it.

Q. What did he do?

A. Well, he just asked the neighbors around there if they wouldn't turn him down some water.

Q. On what ground did he ask that?

By Mr. PIERSON: To which we object on the ground that it's irrelevant and immaterial.

A. Well, because he didn't have any water down there and he wanted water.

Q. Did he claim he had a better right than you did?

A. I don't remember of his ever referring to the water rights, whether one was older or the other was older.

Q. Don't you know that he was enjoying this water from '87 up to the time that you settlers located there and took the water away from him, and his business up there to see you people
560 was to get you to turn the water down to him under his right that he had already acquired before you settled there?

By Mr. PIERSON: To which we object on the ground that it is irrelevant and immaterial.

A. I never seen him using any water until after I had been using water up there.

Q. Don't you know though, and didn't you learn after you made your appropriation, or before that time, that he and Howell each had a water right down in Wyoming and were claiming the water?

A. I heard that.

Q. Didn't you hear that before he came up there to get it?

By Mr. PIERSON: We object to that as irrelevant and immaterial.

A. No, I don't know that I heard that before he came up; I heard it when he did come up.

Q. You heard it from him too, didn't you?

A. No.

Q. Who did you hear it from?

A. I heard it from the neighbors around there.

Q. Well, who?

A. Mike Wrote and Jack Bowler and Joe Graham; there was some of them that was talking it over among themselves about the water.

561 Q. Now, didn't you reach the conclusion, after you talked with your neighbors, that you wouldn't recognize his right and wouldn't turn any down?

A. Why, yes, I reached the conclusion that I wouldn't turn him any water down.

Q. Didn't you and your neighbors agree that you wouldn't do it?

A. No, sir.

Q. Was not that the understanding with the others?

A. No, sir.

Q. Did they turn him any down?

A. I don't know.

Q. You do not?

A. No.

Q. Don't you know that they did not turn him any down?

A. No.

Q. Don't you know that they told you they would do it?

A. Some of them did.

Q. Didn't you all agree to pull together to fight this lawsuit as against them?

By Mr. PIERSON: We object to that as irrelevant and immaterial.

A. There wasn't only the one of them in it any way at that time; Howell was the only one that was represented at that time.

Q. I am not talking about the lawsuit; I am talking about the claim of these two men, Morris and Howell; at that time didn't they each claim a right?

A. Yes.

562 Q. As against you people?

A. Yes.

Q. Now, didn't you people consider the matter and determine that you would not recognize the right of either one?

A. No, because I was not into that suit at that time.

Q. I am not talking about any suit; before any suit was brought, when either one of these men came up there and demanded water from you, after that didn't you talk among one another and agree that you would not recognize the right of either one of them, before any suit was brought at all?

By Mr. PIERSON: We object to that as irrelevant and immaterial.

A. No, sir.

Q. Did you talk about it?

A. Yes, sir, we talked about it a whole lot.

Q. And none of you let any water down?

A. I didn't.

Q. And the others didn't either?

A. I don't know.

Q. Don't you know they didn't?

A. I wouldn't be positive they didn't.

Q. Did you ever hear of them doing it?

By Mr. PIERSON: We object to that as irrelevant and incompetent.

563 A. Yes, sir, I have heard that they did, some of them turned it down.

Q. To these people?

A. Yes.

Q. Or to one another?

A. Oh, no, to these people. I don't know that they did, though.

Q. I will ask you after this lawsuit was brought and a decree was obtained giving Howell one hundred and sixty inches of that water, if you didn't still continue to use it and refuse to turn it down to him?

By Mr. PIERSON: We object to that as irrelevant and immaterial.

A. Yes, sir, I did.

Q. Were you the one that was arrested for contempt?

A. No, sir, I was not in that.

Q. Well, who was arrested for contempt?

By Mr. PIERSON: We object to that on the ground that it's irrelevant and immaterial and the record is the best evidence.

A. Jack Bowler was arrested and Abe Huntley was arrested.

Q. Now, were there any others arrested?

A. Not to my knowledge; not to my certain knowledge.

Q. And in that way it was determined by the Circuit Court of Appeals that this decree of Mr. Howell's was void?

564 By Mr. PIERSON: We object to that as irrelevant and immaterial and not the best evidence.

A. I don't know whether that was the ground or not; I ain't well enough posted, but there was ground somewhere to determine that the decree was void.

Q. These men were turned loose anyway?

A. They were turned loose.

Q. Well, now, after they were turned loose didn't you all go on using that water and refuse to allow it to run down to Howell and Morris after that?

A. I did.

Q. Don't you know the rest did?

A. No, sir.

Q. You don't know that?

A. No, sir.

Q. Did you talk it over after that, after you had got your work in on Howell?

A. Yes, sir, I suppose we all was pleased to think that we didn't have to turn the water down.

Q. Did you get together and have a banquet over it?

A. No, we didn't drink any whisky or smoke any cigars on it.

Q. Now, I will ask you this: You remember when you were sued in this case?

A. Yes, sir.

Q. By Mr. Morris?

565 A. I know I was sued; I don't know when it was.

Q. How long ago has that been, about how many years?

By Mr. PIERSON: We object to that on the ground that the record is the best evidence.

Q. Two or three?

A. No, I don't think it's been that long; I don't know.

DEFENDANTS' EXHIBIT "I."

This indenture, made on the fourteenth day of November, in the year of our Lord one thousand eight hundred and ninety-three, between Frank A. Shields, of Yellowstone County, Montana, the party of the first part, and Wallace A. Bent and S. W. Bent, both of said County and State, the parties of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of One Dollar, lawful money of the United States, to him in hand paid by the said parties of the second part, the receipt of which is hereby acknowledged, does grant and convey, remise, release, and forever quitclaim unto the said parties of the second part, and to their heirs and assigns, the following described real estate situated

in the county of Yellowstone and State of Montana, to wit: All the improvements of every name and nature situate on
 566 that portion or parcel of land lying and being situate on both sides of Sage Creek, beginning at a point or line across said Sage Creek about one hundred yards above the point on said creek where what is known as the Bridge Road, crosses and intersects said creek, and extending down on both sides of said creek for a distance of one mile, said lands being situate in the county of Yellowstone, State of Montana. Also all my right, title and interest in and to my water right as described and set forth in a certain Notice of Water Right signed by John Widman and Abraham L. Huntley and filed in the office of the Clerk of said County of Yellowstone, on the 1st day of November, 1892, and on the 17th day of March, 1893, a quitclaim deed of said water right was given said party of the first part by said John Widman, together with all the tenements, hereditaments and appurtenances thereunto belonging, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the said premises, and every part and parcel thereof, with appurtenances and to said water right.

To have and hold, all and singular, the said premises, with
 567 the appurtenances, and the said water rights unto the said parties of the second part, their heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

FRANK A. SHIELDS. [SEAL.]

Signed, sealed and delivered in the presence of

CLIFTON GEORGE.

(Morris vs. Bean et al. Defendant's Exhibit "I." H. L. W.)

STATE OF MONTANA.

County of Yellowstone, ss:

On this fourteenth day of November, A. D. one thousand eight hundred and ninety-three, personally appeared before me, Clifton George, a Notary Public in and for Yellowstone County, Montana, Frank A. Shields, whose name is subscribed to the foregoing instrument as a party thereto, personally known to me to be the same person described in and who executed the said foregoing instrument as a party thereto, and who has acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

568 In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL.]

CLIFTON GEORGE,

Notary Public in and for Yellowstone County, Montana.

Filed for record this 6th day of March, at 4.15 P. M., 1895. U. E. Frizelle, County Recorder. By S. W. Soule, Deputy.

STATE OF MONTANA,
County of Yellowstone, ss:

I hereby certify that the instrument to which this certificate is annexed, is a true complete and correct copy of the records in my office.

Witness my hand and seal of office this 21st day of December, A. D. 1904.

[SEAL.]

J. W. FISH,
County Clerk and Recorder,
By IRA L. WHITNEY, Deputy.

(Exhibit "I" 2. H. L. W.)

DEFENDANTS' EXHIBIT "J."

This indenture, made the seventeenth day of March, in the year of our Lord one thousand eight hundred and ninety-three between John Widman of the County of Yellowstone, and State of
569 Montana, the party of the first part, and Frank A. Shields of said State, the party of the second part, Witnesseth: That the said party of the first part, for and in consideration of the sum of one dollar, of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant and convey, remise, release and forever quitclaim unto the said party of the second part, and to his heirs and assigns, all the improvements of every name and nature situate on that portion or parcel of land lying and being situate on both sides of Sage Creek beginning at a point or line across said Sage Creek about one hundred yards above the point on said creek where what is known as the Bridger Road crosses and intersects said creek, and extending down on both sides of said Creek for a distance of one mile, said lands being situate in the County of Yellowstone, State of Montana; also all my right, title and interest in and to my water right as described and set forth in a certain notice of water right signed by John Widman and Abraham L. Huntley and filed in the office of the Clerk of said County of Yellowstone, on the 1st day of November, 1892.

Together with all and singular, the tenements hereditaments
570 and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises, and every part, and parcel thereof, with the appurtenances, and to said water right.

To have and to hold, all and singular, the said premises, together with the appurtenances, unto the said party of the second part, and to his heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

JOHN WIDMAN. [SEAL.]

(Morris vs. Bean et al. Defendant's Exhibit "J." H. L. W.)

STATE OF MONTANA,

County of Yellowstone, ss:

On this sixteenth day of March, A. D. 1893, before me, a Notary Public, in and for said County, came John Widman, who is personally known to me to be the person described in and who executed the foregoing instrument, and who acknowledged to me that
571 he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

[SEAL.]

JAS. R. GOSS,
Notary Public.

[Endorsed:] Quitclaim deed. John Widman to Frank A. Shields. Morris vs. Bean et al. Defendant's Exhibit "J." H. L. W.

Deposition of S. W. Bent (Recalled) on Behalf of Defendants.

S. W. BENT, having been first duly sworn as a witness on behalf of the defendants, upon examination by Mr. Pierson testified as follows:

Direct examination by MR. PIERSON:

Q. Mr. Bent, where is your land situate with reference to Sage Creek?

A. It's on Sage Creek; lays on both sides of Sage Creek.

Q. How long have you known the land of yourself and your brother?

A. Since the spring and summer of '93.

Q. What improvements have you on your place?

A. I have ditches and fences, house, barns, stables, corrals and sheds.

Q. Do you know the value of the improvements on your place?

572 A. Why, they are worth about two thousand or twenty-five hundred dollars.

Q. How many acres of crop have you on your place?

A. Why it's all crop, it's wild hay, timothy and alfalfa.

Q. Give us the acreage.

A. About one hundred and fifty.

Q. One hundred and fifty?

A. Yes, sir.

Q. What kind of crop is it?

A. Why hay and grain.

Q. How many inches of water per acre does that land require?

A. Why, about an inch to the acre.

Q. How many inches to the acre does your brother Wallace Bent's land require?

A. About the same amount.

Q. And you are interested in the ditch with your brother?

A. Yes, sir.

Q. Take out water for the two places?

A. Yes, sir.

Q. State whether the headgate is located on Government land or not.

A. It was Government land at the time it was located.

Q. And what's the size of your ditch?

573 A. It's about—I couldn't say the exact size; it's about three feet wide and about a foot deep.

Q. And state whether or not it will carry the water which may go through your headgate?

A. Yes, sir, it will.

Q. Now, have you any other source of water supply other than Sage Creek?

A. No, sir.

Q. You say you have been acquainted with these two ranches since 1893?

A. Yes, sir.

Q. Of whom did you purchase your place?

A. A. L. Huntley.

Q. Were there any writings made?

A. Yes, sir.

Q. Where are those writings?

A. They are in the clerk and recorder's office or the clerk of the court has them; they may be in evidence up there.

Q. You purchased your land and the ditch and water right from

A. L. Huntley?

A. Yes, sir.

Q. Did he turn possession of it over to you?

A. He did, yes, sir.

Q. At the time you made the purchase?

A. Yes, sir.

Q. And he delivered to you the writing?

A. Yes, sir.

574 Q. Is the land, ditch and water right described in that writing the same which you now have?

A. Yes, sir, it's the same.

Q. And the same ditch and water right?

A. Yes, sir.

By Mr. PIERSON: We now present a certified copy of deed from A. L. Huntley to S. W. Bent, the defendant Bert Bent in this case, and ask that it be marked Defendants' Exhibit "K" for identification and attached as a part of the deposition of S. W. Bent.

(Paper marked as requested.)

Q. Mr. Bent, what is your true name?

A. Samuel W. Bent.

Q. You are commonly called Bert Bent?

A. Yes, sir.

Q. And you are sued in this case as Bert Bent?

A. Yes, sir.

Q. To what extent has Mr. A. L. Huntley and your brother Wallace Bent used the waters of Sage Creek since you knew it in 1893?

A. You mean what amount?

Q. Yes, sir.

A. They have used the full amount.

Q. How much is that?

A. Two hundred and twenty-five inches.

575 Q. You are acquainted with the waters of Sage Creek?

A. Yes, sir.

Q. And acquainted with the measurement of water?

A. Yes, sir.

Q. Now, what month of the year was it in '93 that you became acquainted with that place?

A. I believe it was in July.

Q. State whether or not this water has been used continuously.

A. Yes, sir.

Q. By them?

A. Yes, sir.

Q. Two hundred and twenty-five inches?

A. Yes, sir.

Q. And since you have owned the place state whether or not you and your brother have used this water continuously?

A. We have, yes, sir.

Q. Since you have known the place in '93 has anyone interfered with the use of the water?

A. No, sir.

Q. Have the two hundred and twenty-five inches been used continuously?

A. Yes, sir.

Q. Without any interruption?

A. No interruption whatever.

Q. And has any attention been given, or the right of William A. Morris or petitioner Howell been recognized by you or your predecessor in interest and your brother?

A. No, sir.

576 Q. Used the water continuously?

A. Yes, sir.

Q. State whether or not during this time the claim to the right of appropriation has been made at all times?

A. By us?

Q. Yes.

A. Yes, it has.

Q. And your predecessor in interest?

A. Yes, sir, decreed by the courts.

Q. State whether or not the water has been used on these two ranches, the one owned by yourself and the other owned by your brother?

A. It has.

Q. State whether or not this water has been used at any time with anyone else; or by any concerted action, or under the permission of anyone else, other than yourself and your co-owner?

A. No, sir.

DEFENDANTS' EXHIBIT "K."

Quitclaim Deed.

This Indenture, made the twenty-seventh day of April, in the year of our Lord one thousand eight hundred and ninety-eight, between Abraham L. Huntley, of the County of Carbon, in the State of Montana, the party of the first part, and Samuel W. Bent, of the said County and State the party of the second part, witnesseth:

577 That the said party of the first part, for and in consideration of the sum of Six Hundred Dollars, lawful money of the United States of America, to him in hand paid by the party of the second part, the receipt of which is hereby acknowledged, does remise, release and forever quitclaim unto the said party of the second part, and to his heirs and assigns, the following described real estate, situate in the County of —, and State of Montana, to wit:

All that parcel of land consisting of one hundred and sixty acres of unsurveyed public land, situate and lying in the county of Carbon in the State of Montana, and being a part and portion of the late ceded Crow Indian Reservation, and opened to settlement by the proclamation of the President and beginning one mile from and below where what is known as the Bridger Road crosses and intersects the stream known as Sage Creek in said County of Carbon and about fifty yards below what is known as Twin Springs on said Sage Creek, and thence extending one mile south from the place of beginning and extending on both sides of said Sage Creek for said distance of one mile, and in width one-quarter of a mile; said parcel of land being designated and marked by a fence, together with all and singular the improvements consisting of all the fence

and buildings and all other improvements now situated on said lands, together with that certain water right belonging to the said party of the first part used in and upon said above described lands, together with all and singular the tenements hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate right, title, interest, property, possession, claim and demand whatsoever as well in law as in equity of the said party of the first part of, in and to the said premises, and every part and parcel thereof with the appurtenances.

To have and to hold, all and singular the said premises, with the appurtenances, unto the said party of the second part, and his heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

ABRAHAM L. HUNTLEY. [SEAL.]

Signed, sealed and delivered, in the presence of

JAS. R. GOSS.

STATE OF MONTANA,

County of Yellowstone, ss:

On this 29th day of April, A. D. 1898, before me Jas. R. Goss,
 a Notary Public in and for said County, came Abraham
 579 L. Huntley, who is personally known to me to be the person
 described in and who executed the foregoing instrument and
 who acknowledged to me that he executed the same freely and
 voluntarily and for the uses and purposes therein mentioned.

[SEAL.]

JAS. R. GOSS,

Notary Public in and for the County of Yellowstone.

Received for record April 2d, A. D. at 5 o'clock P. M.

E. J. McLEAN,

*County Recorder,*By M. L. NEWKIRK, *Deputy.**Certificate.*

STATE OF MONTANA,

County of Carbon, ss:

I, G. L. Finley, County Clerk and Recorder in and for said
 County and State, do hereby certify that the annexed instrument
 of writing is a full, true and correct copy of quitclaim deed as ap-
 pears from the original on file and indexed in Vol. 5 of Deeds, on
 page 149, Records of said Carbon County, and that the same was
 filed on the 2d day of April, 1900, at 5 o'clock P. M.

In testimony whereof, I have hereunto set my hand and af-
 fixed the seal of said County at my office in Red Lodge,
 580 Montana, this the 21st day of December, A. D. 1904.

[SEAL.]

G. L. FINLEY,

County Clerk,

By M. L. NEWKIRK,

Deputy Clerk.

[Endorsed:] Morris vs. Bean. Defendant's Exhibit "K." H.
 L. W.

*Deposition of F. W. Hine (Recalled)—Direct Examination by Mr.
 Pierson.*

W. F. HINE recalled.

(Examination by Mr. PIERSON:)

Q. Mr. Hine, did you measure Mr. Bainbridge's headgate?

A. Yes, sir.

Q. How many headgates did Mr. Bainbridge have?

A. He has two.

Q. Give us the measurement of each?

A. The west headgate—or north——

Q. That's on the northwest bank of the creek?

A. Yes, the creek runs nearly due west there.

Q. All right; proceed?

A. It's one foot four inches wide by one foot seven in depth, and the east one is——

Q. The east headgate?

A. The southeast headgate is one foot nine inches by one foot nine, square box.

581 Q. State whether or not Mr. Hine you noticed the capacity of these two ditches of Bainbridge's?

A. Why in regards to the fall of the ditch?

Q. Well, the carrying capacity of the ditch?

A. Yes.

Q. State whether or not these ditches will accommodate or carry the amount of water which will pass through the headgates?

A. Yes, sir.

Q. You have had experience in measuring water?

A. Yes, sir.

Q. As an irrigator?

A. Yes, sir.

Q. State whether or not the ditches on Bainbridge's place would carry sufficient water to irrigate his place?

A. Yes, sir they would.

Q. Now then, did you notice the headgate of Mr. Bean?

A. Yes, sir.

Q. Give us the size.

A. His headgate on the east side of the creek is two foot one and one-half inches in width by one foot in depth, and the west headgate is thirty-six inches in width by sixteen inches in depth.

Q. Did you observe the carrying capacity of the two ditches owned by Mr. Bean?

A. Yes, sir.

Q. State whether or not these two ditches have sufficient carrying capacity to accommodate the water which would pass through the headgates?

A. Yes, sir, it would.

582 Q. And state whether or not Mr. Bean's ditches have sufficient carrying capacity to carry enough water to irrigate his land?

A. Yes, sir.

By Mr. McCONNELL: We move to strike out the answer for the reason that the proper way to prove whether he had water enough is to prove what the ditch would carry and what the necessity of the ranch is.

Q. What would be the carrying capacity of Mr. Bean's two ditches?

A. Well, as far down as we measured the ditch probably three or four hundred feet from the headgate down, with the fall of the country it would carry a hundred and fifty inches of water.

Q. Each ditch?

A. Each ditch, the way he has them made.

Q. As to Bainbridge's ditch?

A. Well, his ditch has nearly the fall of the country; the fall of his ditch was nine-tenths of a foot in two hundred feet.

Q. Well, the carrying capacity, what would be the carrying capacity of Mr. Bainbridge's ditch?

A. It would carry two hundred inches of water.

Q. Each one of them?

A. Yes, sir.

Q. Mr. Hine, did you measure the headgate to the Corbett Bennett ditch?

A. Yes, sir.

Q. Give the measurements.

583 A. It is one foot in depth by two foot in width.

Q. And did you notice the carrying capacity of his ditch?

A. Not particularly, no, sir, I didn't notice it.

Q. Would you be able to estimate it?

A. I wouldn't like to estimate it on that particular ditch; I didn't pay much attention.

Q. You wouldn't estimate it, Mr. Bennett's ditch, ou wouldn't estimate it?

A. Well, where we measured it below there it was three foot on the bottom, four foot on top and eighteen inches in depth.

Q. What is the fall of the ditch?

A. I couldn't say.

Q. Has it the fall of the country?

A. Yes, sir.

Q. State whether or not this ditch has sufficient carrying capacity to carry the water which would be admitted by the headgate?

A. Yes, sir, I should think it had.

Q. State whether or not this ditch would carry one hundred and fifty inches of water?

A. Yes, sir, it would as far as I saw of the ditch, it would carry that much water.

Q. Now as to Mr. Wallace Bent and Bert Bent's ditch, did you measure their headgate?

A. Yes, sir.

584 Q. Give the size?

A. The Bert Bent headgate was a box set in twenty-three inches wide and forty-eight inches in height, set out, a wide opening in the ditch.

Q. Haven't you any other measurement there Mr. Hine of that headgate?

A. No, sir, I just measured the box that was set in there.

Q. I say haven't you any other measurement of that?

A. That was all of the headgate because it run right out of the ditch there. The ditch was two feet six inches on the bottom by three feet six inches on top and eighteen inches deep.

Q. What would be the carrying capacity of that ditch?

A. Well, it would carry a hundred and fifty inches of water.

Q. Carry more than that?

A. Yes, sir, carry more; it would carry all that was required of that ditch, the Bert Bent ditch.

Q. You are speaking of the individual ditch?

A. Yes, sir.

Q. You have been testifying about Bert Bent's individual ditch?

A. Yes, sir.

Q. Now, the joint ditch of Bert Bent and Wallace Bent; is it one or two ditches?

585 A. It's all one.

Q. How long is the Bent Brother's ditch?

A. It's forty inches in width and six inches in depth and the ditch had the fall of the country there.

Q. That's the headgate you are giving us the measurement of?

A. Yes, sir.

Q. Give us the measurement of the ditch.

A. Well, sir, we didn't take the measurements of the ditch above there.

Q. Well, did you observe the ditch?

A. Yes, sir, it was a large ditch; we didn't put any measurements onto it because it was getting dark and we drove up there a little late.

Q. What would you say would be the carrying capacity of the ditch?

A. Well, the ditch would carry all the water that went through the headgate.

Q. It would?

A. Yes, sir.

Q. How much water would go through the headgate?

A. Two hundred and forty inches.

Cross-examination.

(By Mr. McCONNELL:)

Q. Don't the carrying capacity of a ditch depend very largely on the fall?

A. Yes, sir, it does.

586 Q. Now, if you didn't take the fall of any of these ditches, how can you tell the carrying capacity of any of these ditches?

A. Well, I estimate them low enough so that I would be certain.

Q. You speak of them carrying all the water that went through the headgate; would not that depend on the fall as to the carrying capacity?

A. Why sure.

Q. Well how can you speak of the carrying capacity of a ditch whose fall you don't know?

A. Well, I know the fall there is about fifteen feet to the mile.

Q. How do you know that?

A. It's the fall of the country.

Q. You spoke of one ditch here just before you took up the Bennett ditch. What was the fall of that ditch?

A. Why Mr. Bainbridge's ditch?

Q. What was the fall of that?

A. The fall of that ditch in four hundred feet it was one foot and six inches fall.

Q. That's a pretty heavy fall?

A. Yes, sir.

Q. The fall of the country there is pretty heavy?

A. Yes, sir; this ditch of Mr. Bainbridge's did not have the fall of the country there.

Q. Most of these ditches have the fall of the country?

A. Yes, where we measured them.

587 Q. What do you say is the fall of the country?

A. There is other witnesses here who know the exact fall of the country; I don't know exactly.

Q. You have just now spoken of it.

A. I said I knew it was fifteen or twenty foot to the mile.

Q. That's pretty heavy fall, isn't it?

A. It's pretty heavy, yes, sir.

Q. It would make the water run down the ditch there like a mill-race?

A. Yes, sir, not as fast as you would generally think: in a larger ditch it would probably run swifter.

Redirect examination.

(By Mr. PIERSON:)

Q. This fall of the country you have reference to, is right up next to the mountains?

A. Yes, sir, right up next to the mountains.

Q. Does that fall continue down below at Morris'?

A. No, sir.

Recross-examination.

(By Mr. McCONNELL:)

Q. What's the fall of the country on Sage Creek above Piney?

A. Well, the fall there is very light as far as up to Mr. Bennett's place; from there on it has a little more, keeps gaining; it
588 has a heavy fall above Wallace Bent's and keeps getting heavier as you go towards the mountains.

Q. Now, what would you say the fall was from the head of the creek to Morris' place?

A. Well, I wouldn't make any estimate as to that; it could be found out from the B. & M. survey from where they crossed the line to Morris'.

Q. How far down from its head does it have this heavy fall?

A. About fourteen or fifteen miles, probably sixteen miles.

Q. Pretty rapid fall that length, pretty heavy fall?

A. Yes, that's right on the head of the creek.

Q. And the water runs in Sage Creek pretty rapidly where this heavy fall exists?

A. In the mountains?

Q. Yes.

A. Yes, sir.

Q. Then it lets up and goes at a slower pace?

A. Yes.

Q. How does it all get through then, all the water coming down so fast, after it lets up, how does it manage it?

A. Because there isn't a very large head of water in the creek.

589 *Deposition of Wallace Bent (Recalled).—Direct Examination by Mr. Pierson.*

Direct examination by Mr. PIERSON:

WALLACE BENT recalled.

(Examined by Mr. PIERSON:)

Q. What is the carrying capacity of the ditch of yourself and your brother from Sage Creek to your place?

A. The carrying capacity is two hundred and fifty inches.

Q. And what is the carrying capacity of this ditch from your place down to your brother's, after you take your water?

A. It's over two hundred inches all the way down to his place.

Deposition of Corbett Bennett (Recalled).—Direct Examination by Mr. Pierson.

CORBETT BENNETT recalled.

(Examined by Mr. PIERSON:)

Q. What is the carrying capacity of your ditch from Sage Creek down to your ranch?

A. Well, at least one hundred and sixty inches.

590 *Deposition of J. N. Bean (Recalled).—Direct Examination by Mr. Pierson.*

J. N. BEAN recalled.

(Examined by Mr. PIERSON:)

Q. What is the carrying capacity of the first ditch that you constructed from Piney Creek to your place?

A. Three hundred inches of water.

Q. That's of the first ditch?

A. Yes, sir.

Q. What's the carrying capacity of the second ditch?

A. The second ditch has one hundred inches.

Q. What is the carrying capacity of the first ditch constructed by Mr. Bainbridge down to his place?

A. I think that his ditch will carry one hundred and twenty-five inches of water.

Q. And what is the carrying capacity of the second ditch constructed by Mr. Bainbridge?

A. About one hundred inches of water.

(By agreement of counsel the certified copy of decree in the case of Wallace Bent and S. W. Bent vs. James Pauley et al. is introduced in evidence and marked Defendants' Exhibit "L" and made a part of the record to be used by any party to this suit.)

(Paper marked Exhibit "L.")

591

DEFENDANTS' EXHIBIT "L."

In the District Court of the Sixth Judicial District of the State of Montana, in and for the County of Carbon.

WALLACE A. BENT and SAMUEL W. BENT, Plaintiffs,

vs.

JAMES PAULEY, JOHN BOWLAR (NELLIE BOWLAR Substituted), O. S. Erickson, Michael Wrote and Tillman C. Graham, Defendants.

Decree.

This action came on regularly for trial upon the third day of January, 1901, of the December, 1900, Term of the above entitled court, the said parties appeared by their attorneys, Geo. W. Pierson, counsel for the plaintiffs, and C. L. Merrill, counsel for defendant Graham, L. B. Reno, counsel for defendant Nellie Bowlar, and W. F. Meyer, counsel for defendants Wrote, Pauley, and Erickson. A jury of twelve persons was regularly impaneled and sworn to try the issues of fact involved in said cause, as advisory to the Court.

Witnesses on the part of the plaintiffs and of each of the defendants were sworn and examined. After hearing the evidence, the arguments of counsel and instructions and special interrogatories given and submitted by the court, the jury retired to consider of their verdict, and findings on the special issues submitted by the court, and subsequently returned into court on the fifth day of January, 1901, their general verdict as follows: "We, the jury, impaneled and sworn to try the above entitled cause, find the issues for the plaintiffs," with their answers and findings on the special issues as follows:

Interrogatory No. 1. How many acres of ground are cultivated and irrigated by the plaintiff Wallace Bent?

Answer. One hundred.

Interrogatory No. 2. What is the date of the appropriation of Wallace Bent through the Huntley and Widman ditch from the waters of Sage Creek?

Answer. October 28, 1892.

Interrogatory No. 3. How many inches of water are necessary to irrigate the land of Wallace Bent?

Answer. One hundred and twenty-five.

Interrogatory No. 4. How many acres are cultivated and irrigated by the plaintiff Samuel Bent?

Answer. One hundred and fifty acres.

Interrogatory No. 5. What is the date of appropriation of plaintiff, Samuel Bent, through the Huntley and Wideman ditch
593 from the waters of Sage Creek?

Answer. October 28, 1892.

Interrogatory No. 6. How many inches of water are necessary to irrigate the land of Samuel Bent?

Answer. One hundred and twenty-five.

Interrogatory No. 7. What was the capacity of the Huntley-Widman ditch at the time of construction?

Answer. Three hundred.

Interrogatory No. 8. What was the date of the commencement of work on the Pauley and Zachary ditch?

Answer. On or about the 28th of May, 1893.

Interrogatory No. 9. What date was said ditch completed?

Answer. 7th day of June, 1893.

Interrogatory No. 10. What was the capacity of said ditch at the time of its completion?

Answer. Four hundred.

Interrogatory No. 11. How many acres are cultivated and irrigated by James Pauley?

Answer. Eighty acres.

Interrogatory No. 12. How many inches of water are necessary to irrigate the land of James Pauley?

Answer. Eighty.

594 Interrogatory No. 13. How many acres are cultivated and irrigated by O. S. Erickson?

Answer. One hundred and thirty acres.

Interrogatory No. 14. How many inches of water are necessary to irrigate the land of O. S. Erickson?

Answer. One hundred.

Interrogatory No. 15. What is the date of the appropriation of James Pauley?

Answer. 1893, May 28th.

Interrogatory No. 16. What is the date of the appropriation of O. S. Erickson?

Answer. 1893, May 28th.

Interrogatory No. 17. What was the date of commencement of work on Bowlar's ditch?

Answer. On or about the 28th day of April, 1893.

Interrogatory No. 18. What was the date of the completion of said ditch?

Answer. 17th day of May, 1893.

Interrogatory No. 19. What was the capacity of said ditch at the time of its completion?

Answer. One hundred and fifty.

Interrogatory No. 20. How many acres are cultivated and irrigated by Nellie Bowlar?

Answer. Forty acres.

595 Interrogatory No. 21. How many inches of water are necessary to irrigate the land of Nellie Bowlar?

Answer. Eighty.

Interrogatory No. 22. What is the date of the appropriation of Nellie Bowlar?

Answer. 28th April, 1893.

Interrogatory No. 23. What was the date of the commencement of work on the Wrote ditch?

Answer. 21st November, 1892.

Interrogatory No. 24. What was the date of the completion of the work on said ditch?

Answer. December 1st, 1892.

Interrogatory No. 25. What was the capacity of said ditch at the time of its completion?

Answer. Two hundred.

Interrogatory No. 26. What is the date of the appropriation of Michael Wrote?

Answer. 21 November, 1892.

Interrogatory No. 27. How many acres are irrigated and cultivated by Michael Wrote?

Answer. Sixty acres.

Interrogatory No. 28. How many inches of water are necessary to irrigate the land of Michael Wrote?

Answer. Ninety.

596 Interrogatory No. 29. What was the date of the commencement of work on the Graham ditch?

Answer. 1893, May 10th.

Interrogatory No. 30. What was the date of the completion of said ditch?

Answer. Completed when flumed in 1893.

Interrogatory No. 31. What was the capacity of said ditch at the time of its completion?

Answer. Four hundred.

Interrogatory No. 32. How many acres are cultivated and irrigated by Tilman C. Graham?

Answer. Sixty-five acres.

Interrogatory No. 33. How many inches of water are necessary to irrigate the land of Tilman C. Graham?

Answer. One hundred.

Interrogatory No. 34. What is the date of the appropriation of Tilman C. Graham?

Answer. July 3d, 1893.

That thereafter, on said fifth day of January, 1901, the Court made an order adopting the findings of the jury, excepting their answer to interrogatory numbered thirty, which the Court answered May 15, 1893, and further ordered that the injunction issued in the above-entitled cause be made perpetual; and that a decree be drafted

597 in conformity with such findings and the order of the Court, and thereafter and on the 7th day of January, 1901, the Court made a further order in said cause which said order was as follows, to wit:

"The order heretofore made on the 5th day of January, 1901, adopting the findings of the jury in the above-entitled action, is hereby set aside so far as the same applies to interrogatories numbered 33 and 34 and all of said findings are hereby adopted as in said order made on the 5th day of January, 1901, except said interrogatories numbered 33 and 34 which said interrogatories are answered by the Court as follows: Interrogatory No. 33. Sixty-five inches. Interrogatory No. 34. May 10th, 1893."

FRANK HENRY, *Judge*.

Wherefore, by reason of the premises, it is ordered, adjudged and decreed:

First. That the defendants and each of them recover nothing of the plaintiffs in this action.

Second. That the plaintiffs have and recover judgment against the defendants, and each and all of them; and that the plaintiffs be and are hereby declared and adjudged to be the owners of the first and prior right to the use of the continuous flow of the waters of Sage Creek, in the County of Carbon, State of Montana, and that they are entitled to such right under date of the twenty-
598 eighth day of October, 1892, and to the amount of two hundred and fifty inches, or six and one-fourth cubic feet per second of time, and that all persons claiming or to claim said waters or the right to use thereof, or any part thereof, through or under said defendants or either of them, are hereby adjudged and decreed to be subsequent in time and right to the right of the plaintiffs, and the right and title of the plaintiff, Wallace Bent, and of Samuel W. Bent, each, to the use of one hundred and twenty-five inches or three and one-eighth cubic feet per second of time of the continuous flow of the waters of Sage Creek, singly, is hereby adjudged to be quieted against all claims and demands or pretensions of the defendants or either of them, and that the defendants and each of them, their servants, agents and employees, be perpetually enjoined and restrained from maintaining, erecting, having or keeping in the channel of Sage Creek, any dam or artificial obstruction, or of diverting the waters of said stream by means of ditches, canals or other artificial aqueduct at any point on said stream above the headgate of plaintiff's irrigating ditch, constructed in 1892 and 1893, known as the Huntley-Widman ditch, in such manner as to
599 prevent or divert the free flow of the waters of said stream, to such an extent or amount that plaintiffs may not at all times have and divert or receive at the point where their irrigating ditch now taps said stream, two hundred and fifty inches or six and one-fourth cubic feet of the continuous flow thereof.

Second. That the right of rights of the plaintiffs, the defendant, Michael Wrote, have the next and third right to the use of ninety inches or two and one-fifth cubic feet per second of time of the continuous flow of the waters of Sage Creek, under date of the twenty-first day of November, 1892, and as against the remaining defendants he is declared to have a prior right to the use of said water, and all

claims of such defendants and each of them, are hereby adjudged and decreed to be subsequent in time and right.

Third. That after and subsequent to the rights of the plaintiffs and the defendant, Michael Wrote, the defendant Nellie Bowlar, have the next and fourth right to the use of eighty inches or two cubic feet per second of time of the continuous flow of the waters of Sage Creek, under date of the twenty-eighth day of April, 1893, and as against the remaining defendants, Pauley, Erickson and Graham, she is declared to have a prior right to the use of said water, and all claims of such defendants and each of them, are hereby adjudged and decreed to be subsequent in time and right.

Fourth. That after the right or rights of the plaintiffs and the defendants Michael Wrote and Nellie Bowlar, the defendant Tilman C. Graham have the next right, ranking fifth in order, to the use of the continuous flow of the waters of Sage Creek, that is, the said Tilman C. Graham shall have the right to sixty-five inches or one and six hundred and twenty-five one-thousandths cubic feet of the continuous flow of the waters of Sage Creek, under date of May 10, 1893, and as against the defendants, Pauley and Erickson he is declared to have a prior right to the use of said water and all claims of such defendants and each of them are hereby adjudged and decreed to be subsequent in time and right.

Fifth. That after the right or rights of the plaintiffs, and the defendants, Michael Wrote, Nellie Bowlar, and Tilman C. Graham, the defendants, James and O. S. Erickson, have the next right in time to the use of the continuous flow of the waters of Sage Creek, that is he said James Pauley shall have the right to eighty inches or two cubic feet per second of time thereof, and the said O. S. Erickson to one hundred inches or two and one-half cubic feet per second of time of the flow of said stream and their time of right shall be equal and under date of the twenty-eighth day of May, 1893, and in the event of there being an insufficiency of water in said stream to supply the said Pauley and Erickson with eighty and one hundred inches respectively, of the flow of said creek, after the aforesaid plaintiffs and defendants have diverted the waters herein decreed to them, then the said Pauley and Erickson shall pro-rate the remaining waters, dividing them in the proportion as the quantities herein decreed to them, sustain to each other.

And the right and title of each defendant, singly, is hereby adjudged to be quieted against all claims, demands, or pretensions of the defendants or either of them designated as having subsequent rights; and that each of the defendants, their servants, agents, and employees, be perpetually enjoined and restrained from maintaining any obstructions in said stream in such a manner or by diverting the waters of said streams by means of dams, ditches or aqueducts, as to interfere or prevent those defendants declared to have a prior right from enjoying the free use of the water herein decreed to them.

And it is further ordered, adjudged and decreed, that the permanent injunction of this court issues herein directed to the said defendants, their servants, agents, employees and attorneys, requiring them and each of them, to perpetually refrain from having or main-

602 taining any dam or artificial obstruction in said channel, or
 from diverting the waters of said stream by means of a ditch
 or ditches, or other artificial aqueducts, in such a manner as
 to interrupt or interfere with the free flow of the water of said creek
 or in any manner interfering with the free flow of the waters of said
 stream, to such an extent that the plaintiffs will be deprived of or
 interfered with — the full enjoyment of the continuous flow of the
 waters herein decreed to them, so that said water shall not reach the
 headgate of the plaintiff's irrigating ditch, and that each defendant
 be so restrained from interfering with the enjoyment of the water of
 each defendant herein decreed to him who may be declared herein
 to have a right prior in time.

Dated the seventh day of January, 1901.

FRANK HENRY, *Judge*.

Filed January 7th, 1901. Exhibit "L"-8. H. L. W.

I, E. Esselstyn, Clerk of the District Court of the Sixth Ju-
 dicial District of the State of Montana, in and for the County of
 Carbon, hereby certify and declare the foregoing to be a full, true
 and correct copy of the decree in the case of Wallace A. Bent et al.
 against James Pauley et al.

603 In witness whereof, I have hereunto set my hand and
 official seal this 20th day of December, A. D. 1904.

[SEAL.]

E. E. ESSELSTYN,
Clerk District Court.

[Endorsed:] Morris vs. Bean et al. Defendants' Exhibit "L".
 H. L. W.

*Deposition of Charles W. English (Recalled) on Behalf of Plaintiff
 and Intervener.*

CHARLES W. ENGLISH, recalled and examined for the plaintiff
 and intervener by Mr. McConnell, testified as follows:

Direct examination by Mr. McCONNELL:

Q. Mr. English, are you acquainted with the rental value of
 the ranch of T. N. Howell, the intervener in this case, the same
 being the ranch in controversy, with water sufficient for its culti-
 vation, for the years 1894 to 1903 inclusive?

By Mr. GODDARD: To which we object on the ground that it's in-
 competent.

A. Why, I would be acquainted with it in '91 and '92.

Q. What would be a reasonable rental value during those years?

A. With plenty of water I should judge five hundred
 dollars.

604 Q. Per year?

A. Yes, sir.

Q. With plenty of water state whether or not its rental value would be the same or less or more for the subsequent years?

A. I should judge it would be about the same.

Q. State whether or not during the years that you were in charge of that ranch there was plenty of water, or whether water was scarce during the irrigating season?

A. We had plenty of water during the irrigating season.

Q. State whether or not you know whether there was plenty of water went down to Mr. Howell's ranch in the year '94 and subsequent years or not?

A. I do not, no sir, I wasn't down there.

Cross-examination.

(By Mr. GODDARD:)

Q. What years did you have charge of the Howell ranch?

A. '91 and '92.

Q. Since that you know nothing of the conditions of the water or whether the land was cultivated at all or not?

A. Why, I was by there in '93 and saw a crop raised there.

Q. Since that what do you say?

A. I haven't been there and don't know anything about it.

605 *Deposition of C. H. Young on His Own Behalf.*

C. H. YOUNG, a witness produced in his own behalf, being duly sworn, and examined by O. F. Goddard, his attorney, testified as follows:

Direct examination by Mr. O. F. GODDARD:

Q. State your name, age, place of residence and occupation?

A. C. H. Young, age, 51 years; residence, Bowler, Carbon County, Montana; farmer and stock-raiser.

Q. Are you one of the defendants in this action?

A. Yes, sir.

Q. How long have you resided on Sage Creek?

A. About six years and eight months.

Q. At the place where you now reside?

A. Yes, sir.

Q. Where is that?

A. That is the old Story ranch on Piney Creek.

Q. Of what is Piney Creek a tributary?

A. It is a tributary of Sage Creek.

Q. Are the lands upon which you live surveyed?

A. Yes, sir.

Q. Have you obtained a title to the lands?

A. Yes, sir.

Q. When did you get the title?

A. I think it was last February year ago; I am not sure.

Q. Have you the patent?

606 A. No, sir, I have not the patent yet.

Q. Have you the final receiver's receipt?

A. Yes, sir.

By Mr. GODDARD: We now offer in evidence copy of the United States patent of this defendant and ask to have the same marked Exhibit "A" and attached to his deposition.

(United States Patent marked Defendant Young's Exhibit "A" and admitted in evidence.)

Q. How long have you been in possession of these lands, described in this receipt?

A. About five years.

Q. From whom did you obtain possession of these lands?

A. From W. D. Story.

Q. How did you obtain possession?

A. I bought the improvements of the place and filed on the land.

Q. Have you a transfer of the conveyance of the improvements on the land?

A. Yes, sir.

By Mr. GODDARD: We hereby offer in evidence the transfer of improvements on the land occupied by this defendant, which we ask to have marked Defendant Young's Exhibit "B" and made a part of this deposition.

607 Q. From whom if you know did Story obtain the improvements and possession of these lands?

A. From John Miner.

Q. Do you know whether he had any conveyance or written transfer of the improvements?

A. No, sir.

Q. Do you know when John Miner settled on these lands of your own knowledge?

A. No, sir, I do not know exactly when it was.

Q. What is the nature of these lands as to being arid or otherwise?

It is admitted by counsel for plaintiff that the lands claimed by this defendant are arid and require artificial irrigation in order to raise crops.

Q. State what means of diversion of waters from Piney Creek were on these lands when you obtained possession of them?

A. There was a ditch, a dam and a headgate from out of Piney.

Q. Where does the ditch tap Piney Creek, on which side of the ditch and at what point?

A. It is on the north side of the creek and on Bainbridge's land, where the head of the ditch comes out of the creek.

Q. How far above the upper side of your land does the ditch tap the creek?

A. I guess it is about 600 yards from the line.

608 Q. What sort of a dam was there at that time?

A. Just some gravel and sticks and a few logs.

Q. State whether or not this dam has been maintained there ever since you have had possession of it?

A. Yes, sir.

Q. What kind of a headgate was at the head of the ditch when you went there?

A. A board headgate, I should judge, about one and one-half feet wide and about a foot high.

Q. Of what was it constructed?

A. Pine planks.

Q. Did it have a headgate for regulating the flow of water?

A. Yes, sir.

Q. Now, where was the headgate placed with respect to the bed of the creek?

A. It is about on a level with the bed of the creek.

Q. Above the dam, or below?

A. Above the dam.

Q. When the water would flow over the dam how much pressure would there be on the headgate, how many inches of water would stand on the headgate?

A. Run up you mean?

Q. Yes.

A. It would run up about six inches.

Q. In ordinary stages of water when the water would be flowing over the dam, would the water above the dam be high enough to run over the top of the headgate in the box?

A. No, sir.

Q. How did you regulate this headgate?

A. I just raised it and let in what the ditch would carry.

Q. You say the headgate was about a foot wide?

A. Well, over a foot wide, about one and one-half feet wide and about one foot high.

Q. State how large the ditch was that was built from the headgate down to your land?

A. The ditch was about three feet across the top, I guess, and it must be two foot at the bottom, and about one foot on an average.

Q. At the weakest place of the ditch, what are its dimensions?

A. At the weakest and smallest place it runs over a gravelly place and is not over three inches deep but it is four foot wide any way.

Q. How much water will your ditch carry at this weakest place, how many inches?

A. It will carry 150, I guess.

Q. How many inches of water have you used at any season for irrigating your land?

A. At flood water I have used 150 inches.

Q. All the ditch would carry?

A. Yes, all the ditch would carry.

Q. Well, now, at low stages?

A. At low stages I did not have over 25 inches.

Q. How many users of water are above you on Piney?

A. There are four.

Q. Who are they?

A. John E. Sadring, J. A. King, J. M. Bean, and Mr. Bainbridge who has no right; he never filed on nor never contended for the water until this year, except at high water and flood water.

Q. Now, state if you have kept this headgate, dam and ditch in the condition you have described since you have had possession of the lands.

A. Yes, sir.

Q. State whether or not you have used the water every year since you have been here for irrigating your lands?

A. Yes, sir, every year.

Q. How much land have you under cultivation during these years?

A. About 55 acres counting the meadow that I irrigate.

Q. How much meadow have you?

A. About 25 acres, I guess.

Q. There is about 20 acres of other lands then you cultivate?

A. Yes, sir.

Q. Now, state how much water would be necessary to properly irrigate these lands, 55 acres, during the irrigating season of each year under ordinary conditions?

611 A. It will take about 75 inches on that ground.

Q. What is the character of the soil?

A. It is kind of light and inclined to be gravelly.

Q. How does it compare with the soil down on Sage Creek?

A. It is a little lighter than that soil.

Q. With reference to the quantity of water necessary how does it compare?

A. It requires more water, I think; the land on Sage Creek seems to be blacker and stronger land.

Q. What crops have you raised these years you have occupied these lands?

A. I have raised wheat, oats, alfalfa, garden truck and hay.

Q. Have you been able to manure crops with the water you have had there?

A. I have until this year. This year they took my water away from me and I did not get it.

Q. State whether or not William A. Morris or Thomas N. Howell have made any demands on you for water during the time you have lived on these lands.

A. Never did; never said anything to me. I never saw Mr. Howell in my life.

Q. Did any persons ever make such a demand of you pretending to be representing these parties?

A. No, sir.

612 Q. Do you know of your own knowledge whether Story used the waters of Piney Creek to irrigate the lands prior to the time you bought him out?

A. Yes, sir.

Q. In what manner and to what extent did he use the water?

A. He used it to irrigate a part he had plowed, and this meadow that I speak of.

- Q. Do you know how much water he used?
 A. He used about the same amount as I use now.
 Q. How many years did he live there?
 A. I am not positive but I think about five years.
 Q. You say of your own knowledge that he used the water every year?
 A. Yes, sir, every year.
 Q. Through this same ditch and headgate?
 A. Yes, sir.
 Q. Do you know whether he raised crops?
 A. Yes, sir, he raised hay, etc.
 Q. As to Miner you say you are not acquainted with his use of the water?
 A. No, sir I am not.
 Q. Have you observed the flow of the water in Sage Creek below the mouth of Piney within the last five years?
 A. Yes, sir.
 Q. To what extent have you observed it, how often each year?
 13 A. I crossed it, I suppose, 200 times each year. I worked out that way driving horses backwards and forwards.
 Q. What has been the stage of the water in the creek below Piney during irrigation season of each year since you have been acquainted with it?
 A. Up to the last few years it has been pretty low.
 Q. How has it been lower down on Sage Creek towards the ranch of W. A. Morris?
 A. It was dry there.
 Q. Do you know whether there are any springs rising along Sage Creek below the mouth of Piney and above the ranch of Morris?
 A. Yes, sir, below the mouth of Piney and above the ranch of Morris I know of two springs.
 Q. About how much water do they flow in the dry season of the year?
 A. They do not run at all, you might say; flows out and goes straight down.
 Q. What is the stage of the water in the Creek when no one is using it for irrigating purposes just above the Morris ranch—I mean in the spring when no one is using it, before the irrigating season?
 A. There is quite a lot of water in the Creek then.
 Q. You are a citizen of the United States and the head of a family?
 A. Yes, sir.

14 Cross-examination.

(By ATTORNEY FOR PLAINTIFFS:)

- Q. Who took your water away from you this year?
 A. Bainbridge and Bean and Ingram.
 Q. You say no demand was ever made on you for water either by the plaintiff or intervener?
 A. No demand was ever made.

Q. You know that Mr. Howell has had to abandon his ranch for want of water since 1897?

A. Mr. Howell has never lived on the ranch since I lived on Sage Creek.

Q. Nor has he pretended to cultivate it?

A. No, sir.

Q. How about Morris, has he levied on this ranch?

A. Yes, sir.

Q. How do you know that Story lived there for five years?

A. I would not say positively that he lived there, but he had a stock of horses that had been there between five and six years, when I came there.

Q. Do you know this of your own knowledge, or are you just speaking from hearsay?

A. Just speaking from hearsay; the man whose place I took when I went to work for Story had been there four years before I came and the man that he took the place from that had been there two or three years.

615 Q. Do you know all this of your own knowledge, or just from hearsay?

A. Only from hearsay.

Q. How long did you work for Story before you bought him out?

A. I worked for him four years before I bought him out?

Q. You know of your own knowledge, then, that he was there four years, had lived there that long?

A. Yes, sir.

Q. What is the first name of this man, Bainbridge whom you say has no right to the water of the Creek?

A. His name is William Bainbridge.

Q. Is this year the first year he ever claimed any right there?

A. Yes, sir; this is the first year he ever claimed the water. I had been giving him water these years to irrigate his place with when I was not using the water, and when I was through using it and would let him irrigate his place. This year he shut down the gate, and turned it into his ditch, and I raised it, and he would shut it down again, after which we got into a fight about it.

Q. Did you give him a good whipping?

A. Yes, sir; I whipped him good.

616 Q. During the irrigating season, the months of July and August, particularly, all the water in Sage Creek and Piney Creek is taken out and used by the appropriators and settlers in Montana, is it not?

A. Yes, sir.

Q. There is not any water runs down to Morris or Howell, is there?

A. There is scarcely any water runs down the creek.

Q. Before irrigating season commences with the settlers in Montana, there is an abundance that goes down to these men?

A. Yes, sir.

DEFENDANT YOUNG'S EXHIBIT "A."

Homestead Certificate No. 2231.

Application 3440.

The United States of America to All to Whom These Presents Shall Come, Greeting:

Whereas, there has been deposited in the General Land Office of the United States, a certificate of the Register of the Land Office at Bozeman, Montana, whereby it appears that pursuant to the Act of Congress approved 20th May, 1862, "To Secure Homesteads to Actual Settlers on the Public Domain," and the acts supplemental thereto, the claim of Claborn H. Young has been established and duly consummated, in conformity to law, for the southwest
617 quarter of the northwest quarter and the northwest quarter of the southwest quarter of section two, and the southeast *quar-*
ter northeast quarter and the northeast quarter of the southeast quarter of section three, in township nine south, of range twenty-five east of Montana Meridian in Montana, containing one hundred and sixty acres, according to the official plat of the survey of the said land, returned to the General Land Office by the Surveyer General:

Now, know ye, that there is, therefore, granted by the United States unto the said Claborn H. Young the tract of land above described; to have and to hold the said tract of land, with the appurtenances thereof, unto the said Claborn H. Young, and to his heirs and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law. And there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States.

In testimony whereof, I, Theodore Roosevelt, President of the United States of America, have caused these letters to be
618 made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the twenty-seventh day of October, in the year of our Lord one thousand nine hundred and four, and of the Independence of the United States, the one hundred and twenty-ninth.

By the President:

[SEAL.]

T. ROOSEVELT.

By F. M. McKEAN, *Secretary*.

C. H. BRUSH,

Recorder of the General Land Office.

[Endorsements:] H. E. No. 2231. Claborn H. Young. Compared. State of Montana, County of Carbon,—ss. Office of County Recorder. I hereby certify that the within Patent was filed in my office on the 5th day of Jan., A. D. 1904, at 12:05 o'clock P. M., and is recorded on page 258 of Book 2 of Patents, records of Carbon County, Montana. Attest my hand and seal of said county. G. L. Finley, County Recorder. By ———, Deputy. Fees, \$1.75. [Seal.] Morris v. Bean et al. Defendant Young's Exhibit "A." H. L. W.

619

DEFENDANT YOUNG'S EXHIBIT "B."

W. D. Story & Co.,

Dealers in General Merchandise, Lumber, Harness, and Grain, Dry Goods, Groceries, Gents' Furnishings, Boots and Shoes, Clothing Hardware, Wagons, and Buggies.

PARK CITY, MONT., July 15, 1901.

Know All Men by These Presents: That I, W. D. Story, sold and transferred to C. H. Young, all my right, title and interest in my claim on Piney, together with all improvements and water rights for a certain promissory note of above date, due two years after date.

(Signed)

W. D. STORY.

Morris vs. Bean et al. Defendant Young's Exhibit "B." H. L. W.

Attest a true copy:

[SEAL.]

GEO. W. SPROULE, Clerk,
By C. R. GARLOW,
Deputy Clerk.

Certificate of Notary Public to Depositions of William A. Morris et al.

STATE OF MONTANA,

County of Yellowstone, ss:

I, Harry L. Wilson, a Notary Public in and for said County and State, do hereby certify that all the witnesses in the foregoing depositions named were by me duly sworn, and that the testimony of all of said witnesses was by me reduced to writing pursuant to the stipulation filed herein; that said depositions were taken before me at my office in the City of Billings, Yellowstone County, Montana, on the ninth and tenth days of August, 1904, and the 21st and 22d days of December, 1904.

That the foregoing 258 type-written pages contain a full, true and correct transcript of all the testimony given by the witnesses therein named at said times and place, and that all of the exhibits

offered in evidence by the respective parties are attached to the foregoing depositions to which they belong respectively.

In witness whereof, I have hereunto set my hand and affixed my notarial seal this seventh day of April, A. D. 1905.

[SEAL.]

HARRY L. WILSON,

Notary Public in and for Yellowstone County, Montana.

[Endorsed:] Title of Court and Cause. Depositions. Opened by Order of Court and Filed and Entered Jun- 7, 1905. Geo. W. Sproule, Clerk.

21 And thereafter, to wit, on the 7th day of June, A. D. 1905, a stipulation submitting cause to Oliver T. Crane, Master in Chancery, was filed herein, as follows, to wit:

In the United States Circuit Court, Ninth Circuit, District of Montana.

WILLIAM A. MORRIS, Plaintiff,

vs.

J. N. BEAN et al., Defendants.

Stipulation Submitting Cause to Master in Chancery, etc.

It is hereby stipulated by and between the parties to the above-entitled cause, by the respective attorneys for said parties, that the said cause may be submitted and argued to Mr. Crane, the Master in Chancery of said Court, and that he be authorized and directed by the Court to hear said cause and to report to the Court his findings of fact and conclusions of law therein.

Dated May 20, 1905.

McCONNELL & McCONNELL,

Solicitors for Plaintiff and Intervener.

O. F. GODDARD,

Solicitor for Defendants King, Wrote and Young.

GEO. W. PIERSON,

Solicitor for Defendants Bean, Bainbridge,

Wallace Bent, Bert Bent, and Bennett.

22 [Endorsed:] Title of Court and Cause. Stipulation. Filed and Entered June 7, 1905. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 10th day of June, A. D. 1905, a stipulation admitting certain facts before the Master was filed herein, as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District
of Montana.

No. 666.

WILLIAM A. MORRIS, Plaintiff,
vs.
J. N. BEAN et al., Defendants.

Stipulation Filed with Master in Chancery Relative to Certain Facts

It is hereby stipulated by and between counsel for the plaintiff and intervener, and counsel for the defendants, that the plaintiff William A. Morris was at the time of the commencement of this action, and is now, a citizen of the United States, and of the State of Wyoming.

It is further stipulated that the points of diversion of the water by the plaintiff and the intervener, respectively, are situated in the State of Wyoming.

623 It is agreed that the foregoing may be read and considered as evidence in the trial of this cause.

This June the 10th, 1905.

N. W. McCONNELL,
JAS. R. GOSS,

Counsel for Plaintiffs.

O. F. GODDARD,

Counsel for —.

GEO. W. PIERSON,

Counsel for —.

[Endorsed:] Title of Court and Cause. Stipulation. Filed with the Master in Chancery, June 10, 1905. Oliver T. Crane, Master. Filed Aug. 10, 1905. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 10th day of August, A. D. 1905, the objections of defendants to admissibility of testimony were filed herein, as follows, to wit:

Objections of Defendants Before Master in Chancery to Admissibility of Testimony.

The defendants insist upon the following objections contained in the record, as to the admissibility of testimony, to wit:

Objection on page five:

Q. State whether you ever appropriated any water for use upon that land, and if so, state what you did to make the appropriation.

624 By Mr. GODDARD: For all of the answering defendants, in the absence of Mr. Pierson, representing a portion of them.

we object to this character of testimony, or any testimony in relation to the water right or the appropriation of water, on the ground that it is incompetent and immaterial, and that this court has no jurisdiction to determine water appropriations or water rights beyond the limits of this State, or the jurisdiction of this court, and this objection is made to all testimony of the character of the testimony elicited by the question just asked.

[Objection Sustained.—Oliver T. Crane, Master in Chancery.]

Page thirteen:

Q. You will please make an exhibit of it, marked Exhibit A, and make it a part of your deposition.

Mr. GODDARD: The answering defendants object to the introduction of the exhibit for the reason that it is incompetent and immaterial and does not comply with either the law of the State of Wyoming or the State of Montana.

[Objection Sustained.—Oliver T. Crane, Master in Chancery.]

625 Page thirteen:

Q. During the years you have been short of water, the last five or six years, state what has been the average damage according to your best judgment.

Mr. GODDARD: That is objected — by all of the answering defendants for the reason that it is incompetent and immaterial; the witness cannot be allowed to state his opinion as to the damage, and it would not be competent for him to state his damage unless it is shown that the damage was caused by the defendants or some of them.

[Objection Sustained.—Oliver T. Crane, Master in Chancery.]

Page 27:

Q. Examine that paper and see if it is the receiver's receipt for a title or patent to those lands. (Witness examines.)

A. Yes, sir.

Mr. GODDARD: To which the answering defendants object upon the ground that it is incompetent and immaterial for any purpose in this case.

[Objection Overruled.—Oliver T. Crane, Master in Chancery.]

All objections to testimony on page 31.

Page 36:

Q. I will ask you to state if that is your statement of claim of water right.

(Paper handed to witness and by him examined.)

A. Yes, sir.

626 By Mr. McCONNELL: I offer this as exhibit "B." to the deposition of Mr. Howell.

By Mr. GODDARD: To which the defendants object upon the ground that it is incompetent and immaterial.

[Objection Overruled.—Oliver T. Crane, Master in Chancery.]

Q. Who sold the railroad company the water?

Mr. GODDARD: We object to that on the ground that it is not the best evidence.

[Objection Sustained.—Oliver T. Crane, Master in Chancery.]

Page 129.

Q. I will ask if water can be taken out of the creek high enough up to cover all the Morris ranch.

By Mr. PIERSON: To which we object upon the ground that it is irrelevant and immaterial as to what other ditches taken from Sage Creek may do toward irrigating this ground.

[Objection Sustained.—Oliver T. Crane, Master in Chancery.]

Page 132:

Q. How much of the hundred and sixty acres all told, cultivated or not cultivated, can be irrigated by this ditch?

627 By Mr. PIERSON: We object to that upon the ground that it is incompetent, irrelevant and immaterial.

[Objection Sustained.—Oliver T. Crane, Master in Chancery.]

[Endorsed:] 42. No. 666. In the Circuit Court of the United States, Ninth Circuit, District of Montana. Wm. A. Morris et al., vs. J. N. Bean et al. Defendants' objections to testimony. Filed and Entered Aug. 10, 1905. Geo. W. Sproule, Clerk. Filed June 10, 1905. Oliver T. Crane, Master in Chancery.

And thereafter, to wit, on the 10th day of August, A. D. 1905, the United States patent issued to W. A. Morris and introduced before the Master, was filed herein as follows, to wit:

United States Patent Issued to W. A. Morris.

THE UNITED STATES OF AMERICA:

To All to Whom These Presents Shall Come, Greeting:

Homestead Certificate No. 329.

Application 249.

Whereas, there has been deposited in the General Land Office of the United States a Certificate of the Register of the Land Office at Lander, Wyoming, whereby it appears that pursuant to
628 the Act of Congress approved 20th May, 1862, "To secure Homesteads to Actual Settlers on the Public Domain," and the acts supplemental thereto, the claim of William A. Morris has been established and duly consummated, in conformity to law, for the east half of the southwest quarter, and the southwest quarter of the southeast quarter of section thirty, and the northeast quarter of the northwest quarter of section thirty-one, in township fifty-eight north, of range ninety-seven west of the Sixth principal meridian,

in Wyoming, containing one hundred and sixty acres, according to the official plat of the survey of the said land, returned to the General Land Office by the Surveyor General:

Now know ye, that there is, therefore, granted by the United States unto the said William A. Morris the tract of land above described: To have and to hold the said tract of land with the appurtenances thereof, unto the said William A. Morris, and to his heirs and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law. And there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States.

In testimony whereof, I, Theodore Roosevelt, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, the twelfth day of February, in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States the one hundred and twenty-sixth.

By the President:

[SEAL.]

T. ROOSEVELT,

By T. H. McKEAN,

Secretary.

C. H. BRUSH,

Recorder of the General Land Office.

Recorded Wyoming, Vol. 26, Page 225.

[Endorsed:] U. S. Land Office. Lander, Wyoming. Received and Filed March 1, 1902. W. T. Adams, Register. U. S. Circuit Court. Morris vs. Bean, 666. Introduced before the Master June 10, 1905. O. T. Crane, Master. Filed and Entered Aug. 10, 1905. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 8th day of May, A. D. 1906, the opinion of the Court was filed herein, as follows, to

wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

WM. A. MORRIS

VS.

J. N. BEAN et al.

Opinion of Circuit Court.

WHITSON, *District Judge:*

Sage Creek is a tributary of the stream designated in these proceedings as Stinking Water River, but geographically known by the euphonious name of Shoshone. This creek rises in the State of Montana, and flows into the river in the State of Wyoming. The complainant, a citizen and resident of Wyoming, is the owner of 160 acres of agricultural land situated in that state, which is riparian to Sage Creek. He settled in the year 1887 under the homestead law, and in due course received a patent dated the 12th day of February, 1902. The land being arid in character, and requiring irrigation for the raising of agricultural crops, in April, 1887, complainant constructed a ditch by means of which he diverted water for the irrigation of it.

631 The intervener, Howell, alleges in his complaint that he is a citizen of the State of Wyoming. It is shown that he is the owner of 200 acres of agricultural land in that state of like character to that of the complainant. He constructed a ditch in August, 1890, for the irrigation of his land, and both the complainant and the intervener have used the water diverted by them ever since their respective diversions, except when prevented by the diversions of the defendants. The intervener has made entry and holds a final receipt. As to whether his land is riparian to Sage Creek does not appear from the record. The defendants are all citizens and residents of the State of Montana. They claim the waters of Sage Creek and Piney Creek, its tributary, by virtue of diversions made by them, and the use of the water so diverted; they deny the rights of the complainant and intervener upon grounds which will hereinafter more fully appear, but are subsequent both in time to both. Complainant seeks to enjoin the defendants from the diversion of water from Sage and Piney Creeks in Montana to his deprivation of the use of the waters of Sage Creek in Wyoming, and the intervener seeks like relief.

The cause was referred to the master, who has reported the testimony, together with his findings of fact and conclusions of law.

632 Those findings to which exceptions have been taken, and those tendered and not found, need only be considered in a general way, leaving a specific mention of them to subsequent proceedings to be had in accordance with this opinion. One of the pivotal points upon which the case largely turns is the finding that the complainant had not at the time of the hearing complied with the laws of the State of Wyoming relating to the appro-

priation of water, and the conclusion that he is not entitled to any injunctive relief for that reason. As this incidentally involves the jurisdiction of the court, and as it is challenged upon other grounds, naturally, the power to consider the case must first be inquired into.

1. Jurisdiction. The objection to jurisdiction is threefold:

(a) The complainant filed no notice as a claimant to the waters of Sage Creek, as required by the laws of Wyoming, and the master concluded that the filing of such notice was a prerequisite to the making of a valid appropriation. Relying upon that fact and the conclusion thus reached, it is contended that the jurisdiction fails because it cannot rest upon the citizenship of the intervener, claimed by the defendants to be the same as that of themselves, and, the complainant having failed to establish any right, it cannot rest upon his citizenship, and therefore a dismissal of the suit must follow. This involves the question whether complainant is an appropriator.

It is conceded by his counsel, as the master found, that he
633 did not comply with the statutory requirements of Wyoming.

The inquiry is, could one seeking to make an appropriation at the time the complainant diverted and used water from Sage Creek acquire the right to its use without complying with the statutes of that State. An appropriation of water consists in the taking or diversion of it, and its application to some beneficial purpose. "Appropriation" is a much-abused word. It is often loosely spoken of as the preliminary step—such as filing a notice, making a claim to the water, or the like—but in its legal significance is embodied not only the claim to the water, but the consummation of that claim by actual use. Long before the enactment of any statute in the arid states or territories, the custom of taking water had ripened into the right to use it. *Jennison v. Kirk*, 98 U. S. 456, 25 L. ed. 240; *Atchison v. Peterson*, 20 Wall. 507, 22 L. ed. 414; *Basey et al. v. Gallagher*, 20 Wall. 670, 22 L. ed. 452; *Broder v. Water Company*, 101 U. S. 274, 25 L. ed. 790. After the custom had been fully established, statutes were enacted for the purpose of protecting appropriators by furnishing a public record, thereby avoiding disputes over priorities. It cannot be said that these statutes were enacted for the purpose of enabling the appropriator to claim by relation to the date when work was begun, because that was the rule prior to any leg-

634 sonable diligence. *Long on Irrigation*, § 51; *Irwin v. Strait et al.* (Nev.) 4 Pac. 1215; *Board of Commissioners v. Leonard* (Colo. App.) 34 Pac. 583; *Kelly v. Water Company*, 6 Cal. 109; *Nevada Ditch Company v. Bennett* (Or.), 45 Pac. 178, 60 Am. St. Rep. 777; *Murray v. Tingley* (Mont.), 50 Pac. 725; *Moyer v. Preston* (Wyo.) 41 Pac. 848, 71 Am. St. Rep. 914; *Cole v. Logan* (Or.), 33 Pac. 569. But the rule of relation was in a measure uncertain in its application, in that what constituted reasonable diligence in the completion of the work was a matter within the sound discretion of the courts. Again, the appropriator who initiates his right by statutory notice is required to designate the amount of water claimed, the purpose for which it is to be used, if for irrigation, the land upon which it is to be applied, etc., thus affording information to other

intending appropriators, and giving constructive notice as to the amount of water which has already been claimed from the common source of supply. But where one has actually diverted water, and is using it, the right to use may, by analogy, be likened unto the doctrine that one purchasing real estate must take notice of the rights of those in possession, notwithstanding the recording statutes. Water diverted from a stream naturally diminishes the volume. One seeking to acquire the right to the use of water must take notice of the amount available and visible, and it must be conclusively
635 presumed that he inquires into the extent of the supply from which the water is to be drawn, and how that supply has been diminished by others whose rights are prior in time. These statutes were never intended to destroy the right of appropriation by methods other than those defined by them. Their only effect is to deny the power of an appropriator who fails to file the notice required, to claim as of the date of the beginning of his work; the penalty for such failure being to limit the right to the time when the water is actually supplied and used. Long on Irrigation, § 39, expresses the principle in this language:

"The statutes did not change the rule as to what constitutes an appropriation, but their object was simply to preserve evidence of the appropriator's rights, and to regulate the doctrine of relation back. In accordance with these principles, it is held that one who fails to comply with the statutory requirements, but who actually diverts water, and applies it to a beneficial use, in the absence of any conflicting adverse claim, acquires a valid title thereto, which cannot be divested by another appropriator, who complies with the terms of the statute after the former has completed his appropriation.
* * * Where the statutory requirements have not been complied with, the rights of the appropriator, which, but for the statutes, would relate back to the commencement of the work of
636 appropriation, relate back only to the completion of the work; this being the only change wrought in the law by the statutes."

These views are sustained by numerous authorities; *Murray et al. vs. Tingley*, 50 Pac. 723, 20 Mont. 260; *Wells v. Mantes et al. (Cal.)*, 34 Pac. 324; *Cruse v. McCauley (C. C.)*, 96 Fed. 370; *De Necochea v. Curtis (Cal.)*, 20 Pac. 563; reaffirmed 22 Pac. 198; *Burrows v. Burrows et al. (Cal.)*, 23 Pac. 146; *Watterson v. Saldunbehere (Cal.)*, 35 Pac. 432.

We are now to inquire whether any law of the territory of Wyoming or custom prevailing there prevented an appropriation other than by notice duly filed; for, if not, complainant has brought himself within the general rule by which his rights must be measured. At the date he began the use of water the statute of the territory precluded the giving of evidence by one claiming to be an appropriator in any case involving his right, unless there had been a compliance with the requirement of filing notice of his claim with the officer therein designated.

The Supreme Court of Wyoming, referring to this statute in *Moyer vs. Preston*, 44 Pac. 845, 71 Am. St. Rep. 914, said:

"The contemporary construction place- upon that statute although the question was not presented to this court, we understand to have been that the act itself provided the penalty for the failure to file the required statements, viz., that in any adjudication of water rights evidence would not be received in behalf of any person until he had filed the statements. The object of these particular provisions was obviously the establishment and preservation of a record of water rights, which had become in many instances of great value. The section requiring such statements to be filed in the offices of the county clerk and clerk of court was repealed in 1888, and another provision substituted, providing for the filing of the statements in the office only of the county clerk, who is ex officio register of deeds; and in 1890, when this requirement was abrogated, and the whole matter was transferred to the office of the state engineer, where the primary records were to be kept, the section of the statute of 1886, fixing the penalty for the failure to file the statements, was repealed. The law of 1890 required the clerks of court to transfer to the office of the state engineer all certificates of county surveyors as to measurements of ditches which had been provided for under another statute of 1886, afterwards repealed; but the act of 1890 made no disposition of the statements of owners which had been filed with the clerks of court."

The statute having been repealed the complainant cannot comply with its provisions. Its repeal removed the only obstacle to the assertion of his right in court. He could, therefore, at the present time give evidence in a controversy in Wyoming relating to the subject-matter of this suit, and hence he cannot be denied a remedy in this court which would be accorded him within the jurisdiction of the forum by whose laws his rights as an appropriator must be governed. Nor is there anything in the Constitution or laws of Wyoming which can be construed as a divestiture of the right which the complainant acquired by virtue of his use of the water, or which can prevent him from the assertion of it.

Article 8, § 3, of the Constitution of Wyoming reads as follows: "Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests."

Section 895 of the Revised Statutes of that state expressly recognizes priority in the use of water.

In *Moyer v. Preston*, supra, this language was used:

"To constitute an appropriation there must exist, not only an intent to take the water, but that attempt must be accompanied or followed by some open physical demonstration, and there must ultimately be an application to some beneficial use."

Again, in construing the priority between two claimants of water, neither of whom had complied with the statute, it was said: "The work of construction was prosecuted with diligence until completion, followed by an immediate application of the water to beneficial uses, which application had been continued.

In *Farm Investment Co. v. Carpenter* (Wyo.), 61 Pac. 258, 50

L. R. A. 747, 87 Am. St. Rep. 918, the constitutional provision above quoted was construed as follows:

"The constitutional declaration was not intended to interfere with previously accrued rights to use the public waters of the state, and it does not conflict with such rights. It was, however, by all the constitutional expressions undoubtedly intended that such rights and all appropriations should be regulated upon the basic principles therein enunciated. That the constitutional provision did not impair rights already accrued is apparent, not only from the accompanying provisions, but from the nature of such rights. * * * The appropriation is made in the first place upon the basis of public ownership of the water, and is protected instead of impaired by the constitutional declaration."

The conclusion must be that complainant is an appropriator, fully invested with all the rights attaching to that interest in property.

(b) It is objected that the amount in controversy does not exceed the sum or value of \$2,000, exclusive of interest and costs. The only testimony upon the subject shows that the water right of the intervenor, Howell, is worth \$25 per acre, and that of complainant a like amount. It is clearly shown, and the court must know, that in an arid country, where irrigation is required for the raising of crops, the land is worthless without it. The Supreme Court has held that the matter in dispute is that upon which the jurisdiction depends. *Elgin v. Marshall*, 106 U. S. 578, 1 Sup. Ct. 484, 27 L. Ed. 249; *Bruce v. Manchester & Keene R. R.*, 117 U. S., 514, 6 Sup. Ct. 849, 29 L. Ed. 990; *Stinson v. Dousman*, 20 How. 461, 15 L. Ed. 936. The water right is the only thing in dispute. It is neither the land, nor in this suit can it be the damages, for it is not shown that the tortious acts of the defendants were joint. The jurisdiction in this regard, therefore, rests upon the value of the water right, and, resting upon that, clearly the amount in controversy is in excess of that required to sustain it. Complainant will be given leave to amend his bill to conform to the proofs upon this view.

(c) The jurisdiction is challenged because Sage creek is an interstate stream, which it is argued precludes an appropriator in Wyoming from the assertion of his rights in Montana; that the state of Montana having recognized the right to appropriate the waters within its borders, it becomes a matter of state concern, which would put upon Wyoming the necessity, in the exercise of its sovereignty, of instituting a suit in the Supreme Court of the United States against the state of Montana, and that a private citizen of one state cannot enter the courts of another to assert that which is exclusively an exercise of the sovereign power of the state; that the defendants are protected by the laws of Montana, which authorize appropriations to be made within its territorial limits; and that it is not competent for the courts to interfere with the sovereignty of one state by permitting a citizen of another state to collaterally assail that which it has recognized by its laws, and will uphold as a part of its political jurisdiction.

Defendants' counsel have illustrated their contention in this way:

iparian owner on the Mississippi river might seek to enjoin the diversion of the waters of Sage creek in Montana because they eventually reach the Missouri river, and finally through that river flow to the Mississippi. This argument may be classed under the head of *reductio ad absurdum*, which sometimes is very effective in illustrating results which may flow from the doing of a given thing. It will be time enough to solve that problem should it ever be provided.

The contention ignores the right to appropriate water which is recognized by both states. It assumes a condition which does not in fact exist, namely, that the state of Montana has undertaken to authorize the appropriation of water as against a prior appropriator in another state. It has authorized by its laws the taking of unappropriated waters. Indeed, it could not authorize the taking of any other without doing violence to well-known principles; and the rule would be the same whether the statutes of that state expressly limited the right to take unappropriated waters or were silent upon the subject; because the doctrine of appropriation, as construed in Montana and elsewhere, is well understood to apply to water the right to the use of which has not already vested in others. In both states the custom of appropriation has been fully recognized before the complainant and intervener began the use of water claimed by them, and it had the sanction of the statutes of each while they were territories, and subsequently received express recognition in the Constitution of Montana (article 3, section 15), and in the Constitution of Wyoming, as shown elsewhere in this opinion. It also had the sanction of the general government, the owner of both the land and the water, and the artificial line drawn between the two territories, created by Congress, could in no way bar one from the exercise of a right so universally acknowledged. A natural stream flowing in Wyoming was as much upon the public lands as the same stream flowing in Montana. At the time of the adoption of the constitutions of those states the rights of the complainant and intervener had vested. For the courts, in the absence of any express and unqualified assertion either in the Constitution or statutes of Montana, or any claim on the part of the state through its proper officers, through whom the contention could only be made, if it could be made at all, to deny the existence of an appropriation made in Wyoming, would be to violate that which has been accepted without dissent, and to disturb vested rights which have the approval of general acquiescence, at the behest of a private suitor, who seeks to invoke the power of the state to do at which it does not even contend for. It would overlook the well-known comity existing between these states, both of which recognize the doctrine as applied to the use of water, in so far as it relates to appropriation of the same, as well as to ignore a public policy well recognized and existing, which has its approval in custom of equal efficacy to the right to appropriate at all—a right which inheres in, and is a part of, the custom to which appropriations of water must be referred.

In the early stages of this suit Judge Knowles refused to sustain

the views thus presented by the defendants. Whether the ruling made is the law of this case does not become material, because the reasons which actuated him in his decision are not only based upon sound principles, but are sustainable upon authority. No case has been cited where the distinction sought to be drawn has prevailed in the courts, but, on the contrary, apparently, wherever the question has arisen the holding has been the other way. *Howell*

644 v. *Johnson* (C. C.), 89 Fed. 556; *Morris v. Bean* (C. C.), 123 Fed. 618; *Hoge et al. v. Eaton et al.* (C. C.), 135 Fed. 411; *Anderson et al. v. Bassman et al.* (C. C.), 140 Fed. 14; *Willey v. Decker* (Wyo.), 73 Pac. 210, 100 Am. St. Rep. 939.

The court therefore has jurisdiction.

2. Riparian rights. The complainant does not and cannot claim as riparian owner. The intervenor has not disclosed such proprietorship. Under the laws of Wyoming, by which their rights must be adjudged, that principle is not recognized. The defendants do claim as such. They base their claim upon the assumption that because the land now owned by them was at the inception of the rights of their adversaries embraced within the limits of the Crow Indian Reservation, that the taking of water by them never conferred the right to its use against the riparian rights of the defendants, acquired, they contend, as the successors in interest to the Crow Indians.

It is difficult to understand how this contention, if upheld, would aid them. The Indians made no appropriations. If all that the defendants contend for in this regard should be sustained, it would be of small value, because the right of a riparian owner to use water for irrigation is limited to a reasonable use, and that reasonable use will not permit one owner to deprive his co-owner of the same

privilege he exercises himself. *Lux v. Haggin*, 69 Cal. 25, 390, 10 Pac. 674; *Long on Irrigation*, §§ 9-18-20; *Union Milling & Min. Co. v. Ferris*, 2 Sawy. 176, Fed. Cas. No. 14,371; *Union Milling & Min. Co. v. Dangberg*, 2 Sawy. 450, Fed. Cas. No. 14,370; *Gould v. Eaton*, 117 Cal. 539, 49 Pac. 577, 38 L. R. A. 181.

While the defendants have pleaded their riparian ownership, they have waged the contest as appropriators. Their testimony was directed exclusively to that claim, and there is no proof as to what would constitute a reasonable use by them, considering the rights of those whose lands are situate in Wyoming. If a decree should declare that they are entitled to a reasonable use of the water flowing through their lands, the rights of the parties would be left in such a state of uncertainty as to render it void. *Morris v. Bean* (C. C.), 123 Fed. 618. When the right of the Indians was extinguished, and the land was thrown open to settlement, it became public, and, presenting for the sake of argument to the theory of the defendants, that was in the way of the validity of the prior appropriations has been removed, and the appropriators in Wyoming were in point of time ahead of any claim which the defendants could possibly make because their appropriations attached eo instanti. *Beecher*

Wetherby, 95 U. S. 525, 24 L. Ed. 440; *Jonhson v. McIntosh*, 8 Wheat. 543, 5 L. Ed. 681.

It is no answer to say that, because the doctrine of riparian ownership does not exist in Wyoming, that therefore, under claim of that right in Montana, the defendants can deprive the complainant and intervener of the use of the water naturally flowing in the stream. While they cannot claim as riparian owners, yet they are entitled to the use of the water and the assertion of riparian ownership in Montana cannot be allowed to prevail as against what are held to be appropriations in Wyoming, when those appropriations are prior in time to the beneficial use of the water by the defendants. It is the water that the appropriator in Wyoming desires, and it is immaterial whether he gets it by virtue of riparian ownership or appropriation.

But this is perhaps drifting into refinements. There are more substantial reasons for denying the claims of the defendants. The Indians were not riparian owners. Their right was that of occupancy only, while the fee was in the United States.

In *Beecher v. Wetherby*, supra, the Supreme Court, in referring to the nature of the title of the Menomonce Indians, said:

"It is true that, for many years before Wisconsin became a state, that tribe occupied various portions of her territory, and roamed over nearly the whole of it. In 1825 the United States undertook to settle by treaty the boundaries of lands claimed by different tribes of Indians, as between themselves, and agreed to recognize the boundaries thus established; the tribes acknowledging the general controlling power of the United States, and disclaiming all dependence upon and connection with any other power. The land thus recognized as belonging to the Menomonce tribe embraced the section in controversy in this case. Subsequently, in 1831, the same boundaries were again recognized. But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States. * * * The right of the United States to dispose of the fee of lands occupied by them has always been recognized by this court from the foundation of the government."

So it was said in referring to the same subject, in *Johnson v. McIntosh*, 8 Wheat. 543, 5 L. Ed. 681:

"The right of the Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy. The possession, when abandoned by the Indians, attaches itself to the fee without further grant."

In case of conflict between a treaty with the Indians and a subsequent act of Congress the latter must prevail. *United States v. Old Settlers*, 148 U. S. 427, 13 Sup. Ct. 650, 37 L. Ed. 509; *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U. S. 641, 10 Sup. Ct. 965, 34 L. Ed. 295; *Cherokee Nation v. Hitchcock*, 187 U. S. 295, 23 Sup. Ct. 115, 47 L. Ed. 183; *Lone Wolf v. Hitch-*

cock, 187 U. S. 564, 23 Sup. Ct. 213, 47 L. Ed. 299. This doctrine is inconsistent with the theory of the defendants. It would be tedious to refer to the numerous acts of Congress which have dealt with the rights of the Indians, together with the many treaties which have been made from time to time. It is sufficient to observe that legislation upon the subject has with great uniformity followed the rule so often reiterated by the Supreme Court in relation to the nature of Indian titles, which recognizes in them the right of occupancy only, subject to the paramount authority and title of the United States. Under Act Feb. 8, 1887, c. 119 (24 Stat. 388), which provides for allotments, not only does Congress adhere to the word "use" with great care as applied to the rights of the Indians, but the act provides for the issuance of patents, which would be quite unnecessary if the fee were already in the Indians. Applying the rule to this case, when the right of occupancy ceased, the fee always having been in the United States, the lands became public by being thrown open to settlement, as the term was defined in *Newhall v. Sanger*, 92 U. S. 761, 23 L. ed. 769. But the land was always a part of the public domain. The rights of the de-
 649 fendants attached as settlers after the lands were made subject to settlement. They cannot antedate settlements made by them. At that time, prior appropriations had been made by the complainant and intervenor, and defendants took their riparian rights subject to and charged with those appropriations. *Benton v. Johncox*, 17 Wash. 277, 49 Pac. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912; *Lux v. Haggin*, 69 Cal. 255-390, 10 Pac. 674; *Thorpe v. Tenem Ditch Co.*, 1 Wash. 566, 20 Pac. 588; *Vansickle v. Haines*, 7 Nev. 249.

3. Statute of limitations. The statute of limitations is applied by analogy in courts of equity to that relating to the possession of real estate. It never runs upon a scrambling possession. It presupposes adverse, exclusive, and uninterrupted possession under a claim of right. The claim must be hostile to that of the person against whom it is asserted. The aid of the statute has occasionally been invoked with success in cases of this character, but not under condition similar to those of this case.

The defendants made their first diversions of water in 1893. A few of them have brought themselves barely within the statutory period. It often happens that persons who are takers of water from a stream gradually enlarge their diversions until they begin to deprive the first appropriators of the amount to which they are entitled. The taking is so gradual, and the enlargement of the use so imperceptible, that it is impossible to fix a time when it be-
 650 gins to be adverse. This is not an unusual situation, and it is presented by the testimony here. The quantity of water in this stream varies greatly from spring floods to low water in the fall. Most small streams are subject to this variation. The flow of water varies also with the seasons, depending largely upon the amount of snowfall or rain in the mountains. It is manifestly impracticable to apply the statute of limitations to such a state of affairs, and in this case particularly it could not apply, because the

defendants have not had the uninterrupted use of the water for the statutory period. It is shown that they at times turned the water on, upon demand of the complainant. They have gradually increased their diversions, and just at what point they encroached on the rights of the complainant and the intervener cannot be determined from the testimony, and just how long it has continued cannot be ascertained; but it is clear that they did not do so to any considerable extent until after the year 1893, and this suit was brought in 1903. As to real estate the possession is easily discovered. It is susceptible of actual proof, but here it is not shown that either the complainant or intervener were ever entirely deprived of water. During the flood time water always reached them. They had the use of it for a time, some years longer than others. Who can divine with definiteness just what amount of water the defendants used to the exclusion of the complainant or intervener, or how long it was used to their exclusion each year? The burden is upon the defendants to bring themselves within the statute, and the proof must be clear before a prescriptive right will be enforced. The claim cannot prevail under the conditions disclosed. *Last Chance Ditch Co. v. Heilbron* (Cal.), 26 Pac. 523; *McGarty v. Fogarty* (Cal.), 61 Pac. 570; *Boyce v. Copper* (Or.), 61 Pac. 642; *Huston et al. v. Bybee* (Or.), 20 Pac. 51; *Long on Irrigation*, §§ 90-91-92.

4. Abandonment. The Statute of Wyoming provides, in effect, that failure of one to use water appropriated for a period of two years shall be construed as an abandonment, and the defendants could avail themselves of its provisions. If it be admitted that their unlawful diversions deprived the appropriators in that state from the use of the water for more than this period, yet cessation of its use because it did not reach the parties entitled to it does not work an abandonment. Evidently that, in contemplation by the Legislature, was a voluntary act, and not an enforced discontinuance. An abandonment must always be voluntary. The statute could not have been intended to apply to anything more than failure to use from an available supply, and in its application it must be construed in the light of the well-known meaning of the words employed to express the legislative will.

5. Estoppel and laches. It is safe to say that few cases of this character have been tried where the defense of estoppel has not been interposed with result uniformly unsuccessful. The estoppel argued for here is that the parties now seeking to assert their rights ought not be allowed to do so, because they knew that the defendants were building up their improvements, and relying upon the use of the water to maintain them. An all-sufficient answer to this is that the defendants knew also that the complainant and intervener were relying upon the same water to maintain their improvements already made, and to carry on their farming operations already begun. Under this view of it, the one side is as much estopped as the other.

What is it that the appropriators in Wyoming have concealed which has misled the defendants to their prejudice? An estoppel of this character is based upon fraud—the inequity of asserting a right

after having by silence misled a party by concealing facts which were unknown to him. Here they were equally known to both parties, hence the case does not present elements upon which an estoppel can be founded. Nor can it be successfully contended that the

moving parties in this controversy have been guilty of laches.
 653 The intervener has been in the courts more than once, attempting to restrain the defendants, and the complainant has protested while the supply of water grew less from year to year, until finally his ills became unbearable. There is no principle of estoppel which can aid the defendants, nor can they invoke the doctrine of laches. *Gallihier v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. 873, 36 L. Ed. 738; *Smyth v. Neal* (Or.) 49 Pac. 850; *Boggs v. Mining Co.*, 14 Cal. 368; *Water Supply & Storage Co. v. Tenney* (Colo. Sup.), 51 Pac. 505; *Lower Latham Ditch Co. v. Loudon Irrigating Canal Co.* (Colo. Sup.), 60 Pac. 629, 83 Am. St. Rep. 80; *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674; *Bathgate v. Irvine* (Cal.), 58 Pac. 443, 77 Am. St. Rep. 158; *Rigney v. Tacoma Light & Water Co.*, 9 Wash. 577, 38 Pac. 147, 26 L. R. A. 425.

6. The equities. Defendants claim that it is inequitable, to use the language of their counsel, "to lay barren and waste the lands of defendants in Montana that two farms in Wyoming may be supplied with water." This may appeal to state pride and local bias, but the contention disregards the maxim that he who is first in time is strongest in right, which is the very essence of the doctrine of appropriation. An appropriator is entitled to the water used by him to the fullest extent as against all persons subsequently claiming.

Complainant and intervener in this case found certain
 654 natural conditions. There was a running stream upon the public lands, supplied from the snows of the Pryor Mountains. It afforded water sufficient for their purposes. The arid lands near and adjoining which were subject to settlement invited its use. Their needs as farmers required it. They took advantage of the benefits which the laws guaranteed and which the conditions made available; hence the plea on behalf of the defendants that the creek goes dry every year, and did prior to their settlements, is not a defense, though it might, for the purposes of this decision, be admitted without aiding them. If the creek goes dry every year, it is because of the shortage of the supply above. It must be assumed that if no snow fell in the Pryor Mountains in any given year, that the water would perhaps not flow into Wyoming; that if this condition continued for several years the water would cease entirely to flow, even to the lands of the defendants, because the supply comes almost entirely from the snowfall. This is illustrative of what must necessarily be true; that is, the greater the fall of snow the more water. This is also true, that the more water which finds its way into the creek the greater will be the flow, and of course the more water that is diverted the less will be the supply. The appropriators took with the right to have the stream continue to flow as it was wont to flow,

and to remain in the condition in which they found it, and
 655 whenever water is diverted above it keeps back that which would otherwise reach them, and the more water that is kept

back the less will the complainant and intervener have. But for the wholesale diversion by defendants the water would reach them later in the season, and abide longer, and this is what their appropriations entitle them to. In the abstract there would be more people benefitted by allowing the defendants to take all the water. Its flow through a sandy and gravelly stretch of something like eight or ten miles, and perhaps farther, is, in a measure, a waste, but equity does not consist in taking the property of a few for the benefit of the many, even though the general average of benefits would be greater. It can no more ignore well-defined legal rights than it can go in the face of a positive statute. Then, again, the theory of the defendants cannot be accepted. The witnesses perhaps have told the truth, but not the whole truth. That the water would not reach one lower down the stream is quite a common defense. It is often urged in irrigation suits by trespassers as a justification for their invasion of the rights of others. It is probably as old as irrigation and perhaps as trespass itself. In this case failure of the water to reach the complainant and intervener was co-incident with its use by the defendants. The fact that witnesses saw in the varying changes of the season a shortage of water at different points on the stream does not explain the whole situation; in other words, in one extremely dry season perhaps the water was lower than in another. It varies, and it varies because of the shortage of the supply above, and these defendants retarded its flow by reason of their diversions, which decreased the supply to that extent which prevented it from reaching Wyoming at all; and when the supply is diminished by the light snowfall the diversion of the defendants increases the shortage, and that is an invasion of the rights of the appropriators who are seeking the enforcement of their priorities in this suit.

7. Damages. No damages other than nominal can be recovered. The defendants did not act jointly. Each claimed individually. There was no community of action. It would not be proper to charge all or either of them with damages at the option of the injured parties, as in the case of a joint undertaking in tort, because their acts were not committed in pursuance of the same common purpose, although they produced the same general result.

8. Extent of the rights of complainant and intervener. The complainant and intervener, respectively, constructed ditches of sufficient capacity to irrigate the whole of their lands. The finding must be that they increased their cultivated area with reasonable diligence, particularly in the light of the unlawful diversions made by the defendants.

57 The master found that the intervener, Howell, had appropriated and was entitled to the use of 110 inches of water, miner's measure, for the irrigation of his 200 acres, which finding will be sustained. He did not find as to the amount diverted and used by the complainant. Upon that the finding will be that complainant is entitled to water for the irrigation of his 160 acres at the same ratio. Under the issues tendered, the priorities of the defendants as between themselves cannot be adjudged, nor can their prayer

that those priorities be fixed, for the purpose of restraining them in the order of the date of their several appropriations.

Findings will be made in accordance with the views herein expressed. The exceptions taken by the defendants will be overruled in so far as they conflict herewith. The decree will enjoin the defendants from diverting the water of Sage and Piney creeks to the prejudice of the parties found to be entitled to the same as prior appropriators, and costs will follow the decree.

Filed May 8, 1906. Geo. W. Sproule, Clerk.

658 And thereafter, to wit, on the 17th day of November, A.D. 1906, an assignment of errors was filed herein by certain defendants, being in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

W. A. MORRIS, Complainant,

vs.

J. N. BEAN, JOHN SADRING, L. O. DILTS, ALLEN P. GRAHAM, William Eley, Curtis Beeler, Charles Ingram, W. R. Bainbridge, C. Runyan, William Sholtz, C. E. Steele, Bert Bent, Wallace Bent, John Rhodes, F. Banderof, O. S. Erickson, Tillman C. Graham, James Pauley, C. M. Brown, John Bowler, J. A. King, A. Holm, C. H. Young, Corbett Bennett, and Michael Wrote, Defendants; T. N. Nowell, Intervener

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Assignment of Errors.

Come now the following named defendants in the above-entitled cause, to wit, J. N. Bean, W. R. Bainbridge, S. W. Bent, Wallace Bent and Corbett Bennett, and say that in the decree herein, made and entered on the 28th day of May, 1906, in favor of the complainant, W. A. Morris, and the intervener, T. N. Howell, adjudging that the complainant W. A. Morris is entitled to one hundred inches, miner's measurement, of the waters of Sage Creek, and its tributaries, of date April, 1887, and that the intervener T. N. Howell is entitled to 110 inches of the waters of Sage Creek and its tributaries, miner's measurement, of date August 1, 1890, and that their rights as so adjudged are prior in right to any right of way of the defendants, and enjoining the defendants from interfering in any manner with the rights of said complainant, and the said intervener as so adjudged, and commanding the defendants to allow, at all times when needed by the said complainant and the said intervener, a sufficient amount of water to flow down the said Sage Creek to satisfy the rights of the said complainant, and the said intervener as so adjudged there is manifest error, and file the following assignment of errors, committed or happening in said cause, upon which they will rely on their appeal from said decree:

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I.

It was error in the Court to overrule the plea of the last above-named appealing defendants, to the effect that there was a defect of parties defendant, and that A. W. Adams, Mrs. Nellie Bowler, John Frost and the Burlington and Quincy Railroad in Montana were not made parties defendant, and that they, the said persons and the said corporation, were necessary parties to this suit.

II.

It was error in the Court to find and rule that the amount in controversy in this suit exceeds the sum of \$2,000, exclusive of interests and costs.

III.

It was error in the Court to find and rule that the complainant, W. A. Morris, made any appropriation on the — day of April, 1887, out of or of the waters of Sage Creek, or that he made any appropriation of such waters or out of said creek at any time prior to the year 1893.

IV.

It was error in the Court to find or rule that the said W. A. Morris ever made an appropriation out of or of the waters of said Sage Creek, for that it appears that he never filed any notice as a claimant to the waters of Sage Creek, as required by the laws of Wyoming.

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V.

It was error in the court to find or rule that the complainant, W. A. Morris, used the waters of Sage Creek from the year 1887 to the year 1894, or that he had plenty of water each year from 1887 to 1894, or that he used the said waters or had any water to use after the year 1891.

VI.

It was error in the Court to find or rule that the intervener, T. N. Howell, in making his alleged appropriation of the waters of Sage Creek, in the State of Montana, complied with the law governing the appropriation and use of water in said state, for that it appears from the testimony and from the finding of fact of the Master that he constructed his ditch during the month of August, 1890, but did not turn the water of the stream through his said ditch until the following spring, and it further appears from the notice of water right offered in evidence by the said T. N. Howell, that no map showing the location or route of the said ditch was ever recorded in the office of the county clerk of Fremont County, within which county his alleged appropriation is claimed to have been made, and for that the courses and distances of his said ditch did not appear in said notice of water right, as required by Section 11 of the act of March 8, 1888, of the laws of Wyoming, and for that the said T. N. Howell never obtained a permit to appropriate the waters of the State of Wyoming, as required by Section

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34 of the act of the legislative assembly of the State of Wyoming, approved December 22, 1890.

VII.

It was error in the Court to rule or find that the said intervener raised a good crop during the year 1893.

VIII.

It was error in the Court to find or rule that the said intervener failed to raise any crops during the years 1894, 1895, 1896, by reason of any act of the defendants, or of these appealing defendants, for that no complaint is made in the bill of said intervener of any acts of the defendants during the years 1894, 1895, and 1896.

IX.

It was error in the Court to find or rule that the defendants had due or timely notice, after they commenced to use the water under their appropriations in the State of Montana, of the claim of the intervener to the waters of Sage Creek.

X.

It was error in the Court to find or rule that the said intervener's appropriation is prior in time to any or all of the appropriations made by any of the defendants.

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XI.

It was error in the Court to find or rule that any appropriation made by the complainant or the intervener of the waters of a stream in the State of Wyoming gave to them, or either of them, any priority over any right acquired by these appealing defendants or any of the defendants, under or by virtue of the laws of the State of Montana, or to the waters of any stream within the State of Montana.

XII.

It was error in the Court to find or rule that any appropriation made by the complainant or the intervener of any water within the State of Wyoming, or made under the laws of Wyoming, or any right to the use of the water of any stream in the said State of Wyoming, or acquired under its laws, furnished any basis before any Court sitting in the State of Montana, for an injunction against these appealing defendants, having appropriated and acquired the right to the use of the waters being used by them within the State of Montana, under and by virtue of the laws of the State of Montana.

XIII.

It was error in the Court to find or rule that the Court had any jurisdiction to enforce, as against citizens of the State of Montana using waters within the State of Montana, of streams within the

State of Montana, appropriated under its laws, rights claimed to have been acquired by the complainant and the intervener to the use in the State of Wyoming of the waters of a stream in the State of Wyoming, acquired under and by virtue of the laws of the State of Wyoming.

XIV.

It was error in the Court to find or rule that the waters of Sage Creek, during the irrigating season do not sink in the channel thereof above the lands of either the complainant or the intervener, but that a useful quantity of the same would reach the lands of the intervener or the complainant during the irrigating season but for the diversion of the same and its tributaries by the defendants, and to fail to find and rule that the waters of the said creek, during the irrigating season, sink in its bed or channel so that though the defendants diverted none of the same, or of the waters of the tributaries of the said Sage Creek, a useful quantity thereof would not reach the lands either of the complainant or the intervener.

XV.

It was error in the Court to find or rule that 110 inches of water, by miner's measure, is necessary for the proper irrigation of the land of T. N. Howell, or that he is entitled to 110 inches of the water in Sage Creek, or that any amount of the waters of said creek in excess of more than forty (40) inches, miner's measurement, is necessary for the proper irrigation of his land, or that he is entitled to any more than forty inches of the waters of said creek, and particularly it was error in the Court to find or rule that in view of the extent of the lands cultivated or irrigated by the said T. N. Howell, he is entitled, under the laws of the State of Wyoming, to more than forty inches of water, miner's measurement, under the alleged appropriation.

XVI.

It was error in the Court to find or rule that the intervener did not use the waters of Sage Creek after the year 1893, and did not attempt to raise any crops after the year 1896, by reason of the acts of the defendants, including these appealing defendants, for that in his petition in intervention he does not complain of any diversion of the waters of said Sage Creek, or its tributaries, by these appealing defendants, or any of them, prior to the year 1902.

XVII.

It was error in the Court to fail and refuse to find and rule that the said T. N. Howell has, and prior to the filing of his petition in intervention, had lost whatever rights he may have had in the waters of Sage Creek by abandonment.

XVIII.

It was error in the Court to find or rule that the intervener, T. N. Howell, was a citizen of the State of Wyoming, at the time he filed his petition.

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XIX.

It was error in the Court not to find and rule that the said T. N. Howell is and at the time of the filing of his petition in intervention was a citizen of the State of Montana.

XX.

It was error in the Court to fail to find that these appealing defendants, and each of them, and particularly the appealing defendants Wallace Bent and S. W. (Bert) Bent, as they specifically assign, and their predecessors in interest, have continuously enjoyed, diverted, appropriated and used the waters of Sage Creek uninterruptedly, without let or hindrance, and adversely to the complainant W. A. Morris and the intervener T. N. Howell, for more than ten years last past, in the amounts respectively set forth in the answer of the said appealing defendants.

XXI.

It was error in the Court to find or rule that these appealing defendants had not, nor had any of them, continuously, uninterruptedly, without let or hindrance, openly and adversely to all persons, with the knowledge and without objection on the part of said complainant or on the part of the intervener, enjoyed the use of the waters appropriated by them, as set forth in their answer, or to find
667 or rule that these appealing defendants had not, nor had any of them acquired the right to the use of the waters by them appropriated, as set forth in their answer, by adverse user.

XXII.

It was error in the Court to find or rule that these appealing defendants had not, nor had any of them, relying on their right to the use of the waters appropriated by them as in their answer set forth, cultivated and seeded the lands irrigated by them as in their answer set out, and placed valuable improvements thereon, as in their answer set out, and that such land and improvements would not become valueless and wholly lost if they should be restrained from diverting the waters so by them appropriated, or to find or rule that neither the said complainant nor the said intervener is estopped from maintaining this action to enjoin these appealing defendants from using the waters so by them appropriated.

XXIII.

It was error in the Court to permit the said intervener T. N. Howell to become a party to this action, or to permit him to file his petition in intervention herein, for that, among other things, it appears from his petition in intervention that he has no controversy with the complainant, but that his controversy is with the defendants only, and it appears from the testimony in the cause that he is a citizen and resident of the State of Montana.

XXIV.

It was error in the Court to enter any decree herein in favor of said T. N. Howell, or to enter any decree with respect to the said T. N. Howell, except to dismiss his petition in intervention on the merits, for that it appears that the complainant has no cause of action and the jurisdiction of this Court falls with the failure of the complainant to sustain his right of action.

XXV.

It was error in the Court to grant any relief to the said intervenor, T. N. Howell, for that the Court is without jurisdiction to administer on the waters of Sage Creek, and is without any jurisdiction to establish or decree a water right in or acquired under the laws of the State of Wyoming.

XXVI.

It was error in the Court to find or rule that these appealing defendants did not have riparian rights to the waters of the streams flowing through their lands, as set forth in their answer, notwithstanding any alleged appropriation made by either the complainant or the intervenor in the State of Wyoming.

XXVII.

It was error in the Court to find that notwithstanding the fact that the headwaters of Sage Creek, from which the complainant and the intervenor claim to have made their appropriations, were within the Crow Indian Reservation, in the State of Montana, at the time such alleged appropriations were made, the Crow Indians within the said reservation had no riparian or other rights in such headwaters of said stream, and that notwithstanding any rights they may have had in such waters, the same were subject to appropriation in the State of Wyoming.

XXVIII.

It was error in the Court to find or rule that any acts of the complainant or the intervenor in the State of Wyoming, while the lands now owned by these appealing defendants were a part of the Crow Indian Reservation, gave to the said complainant or the intervenor any priority of right to the waters of Sage Creek as against the rights of the Indians to the waters of the streams within the said reservation, or as against any persons acquiring any of said lands through which any streams of the said reservation might flow, and particularly as against these appealing defendants acquiring lands within what was the said Crow Indian Reservation, at the time of the alleged appropriations of the said complainant and the said intervenor on the opening of said reservation, through which flowed the streams, from making use of the waters of which the decree entered herein enjoins these appealing defendants.

XXIX.

670 It was error in the Court to hold that any acts of the complainant or the intervener, towards the appropriation of the waters of any stream in the State of Wyoming, gave to them any rights as against occupants of lands within what was formerly the Crow Indian Reservation, as to streams flowing through the same, antedating the time when such lands ceased to be a part of said Crow Indian Reservation.

XXX.

It was error in the Court to hold that appropriations could be made of waters running through the Crow Indian Reservation superior to the rights of those subsequently becoming riparian owners.

XXXI.

It was error in the Court to find that the cause of action of the complainant is not barred by the statute of limitations.

XXXII.

It was error in the Court to find that the complainant is not guilty of such laches as to defeat his right to maintain this action.

XXXIII.

It was error in the Court to find that the complainant is not estopped from maintaining this action.

XXXIV.

671 It was error in the Court to find that the complainant has not abandoned any right he ever acquired as against these appealing defendants to the waters of Sage Creek.

XXXV.

It was error in the Court to find that the cause of action of the intervener is not barred by the statute of limitations.

XXXVI.

It was error in the Court to find that the intervener is not guilty of such laches as to defeat his right to maintain this action.

XXXVII.

It was error in the Court to find that the intervener is not estopped from maintaining this action.

XXXVIII.

It was error in the Court to find that the intervener has not abandoned any right he ever acquired as against these appealing defendants, to the waters of Sage Creek.

Therefore, the said appealing defendants, J. N. Bean, W. R. Bainbridge, S. W. Bent, Wallace Bent and Corbett Bennett, pray that the said decree so as aforesaid made and entered herein on the 28th day of May, 1906, be reversed and that it be ordered that the said appealing defendants, J. N. Bean, W. R. Bainbridge, S. W. Bent, Wallace Bent, and Corbett Bennett have a decree as prayed in their answer herein.

GEO. W. PIERSON AND
T. J. WALSH,

*Solicitors for Appealing Defendants J. N. Bean,
W. R. Bainbridge, S. W. Bent, Wallace Bent, and
Corbett Bennett.*

T. J. WALSH,
Of Counsel.

[Endorsed:] Title of Court and Cause. Assignment of Errors.
Filed Nov. 17th, 1906. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 17th day of November, A. D. 1906, an order allowing appeal was duly made and entered herein, in the words and figures following, to wit:

3 In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

W. A. MORRIS, Complainant,

vs.

N. BEAN, JOHN SADRING, L. O. DILTS, ALLEN P. GRAHAM, William Eley, Curtis Beeler, Charles Ingram, W. R. Bainbridge, C. Runyan, William Sholtz, C. E. Steele, Bert Bent, Wallace Bent, John Rhodes, F. Banderof, O. S. Erickson, Tillman C. Graham, James Pauley, C. M. Brown, John Bowler, J. A. King, A. Holm, C. H. Young, Corbett Bennett, and Michael Wrote, Defendants; T. N. Howell, Intervener.

Order Allowing Appeal.

On this 17th day of November, 1906, came the above-named defendants, J. N. Bean, W. R. Bainbridge, S. W. (Bert) Bent, Wallace Bent, and Corbett Bennett, and move the Court to be allowed an appeal from the decree of this court herein rendered and entered on the 28th day of May, 1906, in favor of the complainant and the intervener and against the defendants, to the United States Circuit Court of Appeals for the Ninth Circuit.

On the filing of the assignment of errors of the said defendants, the Court does hereby allow the said appeal, and hereby fixes the amount of the bond of the said appeal in the sum of \$1500.00, which said bond shall operate as a supersedeas as to the costs by the said decree adjudged to be paid by the said appealing defendants, and the Court further orders that a certified transcript of the record, proceed-

ings and papers upon which said decree appealed from was based or rendered be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 17th day of November, 1906.

By the Court,

WILLIAM H. HUNT, *Judge*.

[Endorsed:] Title of Court and Cause. Order Allowing Appeal Filed and Entered Nov. 17th, 1906. Geo. W. Sproule, Clerk.

675 And thereafter, to wit, on the 27th day of November, A. D. 1906, the defendants filed their bond on appeal herein, bearing in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

W. A. MORRIS, Complainant,

VS.

J. N. BEAN, JOHN SADRING, L. O. DILTS, ALLEN P. GRAHAM, William Eley, Curtis Beeler, Charles Ingram, W. R. Bainbridge, C. Runyan, William Sholtz, C. E. Steele, Bert Bent, Wallace Bent, John Rhodes, F. Banderof, O. S. Erickson, Tillman C. Graham, James Pauley, C. M. Brown, John Bowler, J. A. King, A. Holm, C. H. Young, Corbett Bennett, and Michael Wroblewski; Defendants; T. N. Howell, Intervener.

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Bond on Appeal.

Know all men by these presents, that J. N. Bean, W. R. Bainbridge, S. W. Bent, Wallace Bent and Corbett Bennett, as principals, and the American Bonding Company, of Baltimore, Maryland, as surety, are held and firmly bound unto the above-named complainant, W. A. Morris, and the above-named intervener, T. N. Howell, and the above-named defendants, John Sadring, L. O. Dilts, Allen P. Graham, William Eley, Curtis Beeler, Charles Ingram, C. Runyan, William Sholtz, C. E. Steele, John Rhodes, F. Banderof, O. S. Erickson, Tillman C. Graham, James Pauley, C. M. Brown, John Bowler, J. A. King, A. Holm, C. H. Young and Michael Wroblewski, defendants, and to all of the parties to the above-entitled cause, separately and themselves, in the sum of five hundred dollars (\$500.00), to be paid to the said parties other than the defendants above named principals in this obligation, for the payment of which, well and truly to be made, the above-named principal- and surety bind themselves, their heirs, and each of their heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Signed and dated this 26th day of November, 1906.

Whereas, the above-named defendants, J. N. Bean, W. R. Bainbridge, S. W. Bent, Wallace Bent and Corbett Bennett, have prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse a decree made a

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entered in the above-entitled cause on the 28th day of May, 1906, by the said Circuit Court of the United States for the District of Montana, and the judge thereof, whereby it was ordered, adjudged and decreed that they, the said defendants so prosecuting the said appeal, together with the other above-named defendants be enjoined from interfering with the rights of the said complainant and the said intervener, as determined in the said decree, and whereby they were commanded to allow at all times, when needed by the said complainant and the said intervener, a sufficient amount of water to flow down to them to satisfy their rights as adjudged in the said decree, to wit, to the complainant, W. A. Morris one hundred (100) inches of the waters of Sage Creek and its tributaries, and to the intervener, T. N. Howell, one hundred and ten (110) inches of the waters of Sage Creek, and its tributaries;

Now, therefore, the condition of this obligation is such that if the above-named defendants, J. N. Bean, W. R. Bainbridge, S. W. Bent, Wallace Bent, and Corbett Bennett, shall answer and pay all costs which may be awarded against them, if they fail to make good their said appeal, then this obligation to be void; otherwise to remain in full force and effect.

J. N. BEAN,
W. R. BAINBRIDGE,
S. W. BENT,
WALLACE BENT,
CORBETT BENNETT,

By T. J. WALSH, *Their Solicitor*,
AMERICAN BONDING COMPANY OF
BALTIMORE,
By MASSENA BULLARD, *Vice-President*.

[CORPORATE SEAL.]

Attest:

H. G. PICKETT, *Secretary*.

The above and foregoing bond is hereby approved.

WILLIAM H. HUNT,
*District Judge of the District of Montana, and One
of the Judges of the Circuit Court of the United
States for the District of Montana.*

Butte, Montana, November 27th, 1906.

[Endorsed:] Title of Court and Cause. Bond on Appeal. Filed and entered Nov. 27, 1906. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 17th day of November, A. D. 1906, a citation was duly issued herein, being in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for
the District of Montana

W. A. MORRIS, Complainant,

vs.

J. N. BEAN, JOHN SADRING, L. O. DILTS, ALLEN P. GRAHAM, William Eley, Curtis Beeler, Charles Ingram, W. R. Bainbridge, C. Runyan, William Sholtz, C. E. Steele, Bert Bent, Wallace Bent, John Rhodes, F. Banderof, O. S. Erickson, Tillman C. Graham, James Pauley, C. M. Brown, John Bowler, J. A. King, A. Holm, C. H. Young, Corbett Bennett, and Michael Wrote, Defendants;
T. N. Howell, Intervener.

Citation on Appeal.

The President of the United States to W. A. Morris, Complainant,
T. N. Howell, Intervener, and John Sadring, L. O. Dilts,
680 Allen P. Graham, William Eley, Curtis Beeler, Charles Ingram, C. Runyan, William Sholtz, C. E. Steele, John Rhodes, F. Banderhof, O. S. Erickson, Tillman C. Graham, James Pauley, C. M. Brown, John Bowler, J. A. King, A. Holm, C. H. Young and Michael Wrote, Defendants:

You are hereby cited and admonished to be and appear at a session of the United States Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, State of California, within thirty days from the date of this writ, pursuant to an appeal filed in the office of the clerk of the Circuit Court of the United States for the District of Montana, wherein you, W. A. Morris are complainant and one of the appellees, and you T. N. Howell are intervener and one of the appellees, and you John Sadring, L. O. Dilts, Allen P. Graham, William Eley, Curtis Beeler, Charles Ingram, C. Runyan, William Sholtz, C. E. Steele, John Rhodes, F. Banderof, O. S. Erickson, Tillman C. Graham, James Pauley, C. M. Brown, John Bowler, J. A. King, A. Holm, C. H. Young and Michael Wrote are defendants and appellees, and the said J. N. Bean, W. R. Bainbridge, S. W. Bent, Wallace Bent and Corbett Bennett are defendants and appellants, to show cause, if any there be, why the judgment and decree

in the said appeal mentioned, in favor of the said complainant and the said intervener, and against the said J. N. Bean

681 W. R. Bainbridge, S. W. Bent, Wallace Bent and Corbett Bennett, defendants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William H. Hunt, Judge of the United States Circuit Court for the District of Montana, presiding in the Circuit Court for the District of Montana, this 17th day of November, 1906.

WILLIAM H. HUNT,

District Judge.

Attest: ———,
Clerk.

Due personal service of the foregoing citation this 21st day of
 ember, 1906, hereby admitted.
 Service Dec. 12, 1906.

McCONNELL & McCONNELL,
Solicitors for Complainant.

J. R. GOSS AND
 McCONNELL & McCONNELL,
Solicitors for Intervener.

O. F. GODDARD,
*Solicitor for Defendants Wrote, Young and
 King, Allen P. Graham and William Eley.*

UNITED STATES OF AMERICA,

District of Montana, ss:

I hereby certify and return that I served the annexed citation on
 the therein-named Allen Graham and Wm. Eley by leaving
 a true and correct copy thereof with O. F. Goddard, their
 attorney, at Billings, and served personally John Sadring,
 rtis Beeler, Chas. Ingram, C. Runyon, C. E. Steele, John Rhodes,
 Banderoff, James Pauley and Tillman C. Graham at Sage Creek
 said District on the 24-26-27 and 28th days of November, A. D.
 1906, and after due and diligent search in my district was unable
 find L. O. Dilts, O. S. Erickson, A. Holm and C. M. Brown.

C. F. LLOYD,

U. S. Marshal.

By GEO. E. YOUNG, *Deputy.*

[Endorsed:] In the U. S. Circuit Court, District of Montana.
 W. A. Morris, Complainant, vs. J. N. Bean et al., Defendants. Cita-
 on. Filed and Entered Dec. 3, 1906. Geo. W. Sproule, Clerk.
 J. J. Walsh, Attorney and Counselor at Law, Helena, Montana, and
 Geo. W. Pierson, Solicitors for Appealing Defendants.

And thereafter, to wit, on the 10th day of December, A. D.
 1906, an order extending time to file record was duly made
 and entered herein as follows, to wit:

in the Circuit Court of the United States, Ninth Circuit, District of
 Montana.

WILLIAM A. MORRIS, Complainant,
 vs.

J. N. BEAN et al., Defendants; T. N. HOWELL, Intervener.

Order Extending Time to File Record.

Good cause being shown therefor, it is ordered that the time for
 filing the transcript on appeal herein with the clerk of the United

States Circuit Court of Appeals, Ninth Circuit, be, and the same is hereby extended until the 31st day of December, A. D. 1906.

Dated this 10th day of December, A. D. 1906.

WILLIAM H. HUNT, *Judge*.

Entered December 10th, 1906. Geo. W. Sproule, Clerk.

684 *Certificate of Clerk, Circuit Court, to Record.*

UNITED STATES OF AMERICA,
District of Montana, ss:

I, Geo. W. Sproule, Clerk of the United States Circuit Court Ninth Circuit, District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 563 pages numbered consecutively from 1 to 563, is a true and correct transcript of the pleadings, process, orders, decree, opinion, testimony, exhibits and all proceedings had in said cause, and of the whole thereof, as appears from the original records and files of said court in my possession; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation issued in said cause.

I further certify and return that the costs of the transcript of record amount to the sum of two hundred fifty-four and 55/100 (\$254.55) dollars, and has been paid by the appellants.

In witness whereof, I have hereunto set my hand and affixed the seal of the said United States Circuit Court for the District of Montana, at Helena, Montana, this 18th day of December, A. D. 1906.

[SEAL.]

GEO. W. SPROULE, *Clerk*.

685 [Endorsed:] No. 1432. United States Circuit Court of Appeals for the Ninth Circuit. J. N. Bean, W. R. Bainbridge, S. W. Bent, Wallace Bent and Corbett Burnett, Appellants vs. W. A. Morris, Complainant, and T. N. Howell, Intervener, and John Sadring, L. O. Dilts, Allen P. Graham, William Eley, Curtis Beeler, Charles Ingram, C. Runyan, William Schlotz, C. E. Steele, John Rhodes, F. Banderof, O. S. Erickson, Tillman C. Graham, James Pauley, C. M. Brown, John Bowler, J. A. King, A. Holm, C. H. Young, and Michael Wrote, Defendants, Appellees. Transcript of Record. Upon Appeal from the United States Circuit Court for the District of Montana. Filed January 16, 1907. F. D. Monckton, Clerk.

86 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1423.

J. N. BEAN et al., Appellants,

vs.

W. A. MORRIS, Complainant, and T. N. HOWELL, Intervener, et al.,
Appellees.

*Certificate of Clerk U. S. Circuit Court of Appeals to Printed
Transcript of Record.*

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing six hundred and eighty-five (685) pages, numbered from one (1) to six hundred and eighty-five (685), inclusive, comprised in the preceding two (2) volumes, marked respectively, Vol. I and Vol. II, to be a true copy of the printed Transcript of Record upon Appeal from the United States Circuit Court for the District of Montana in the above-entitled case as the original and copies thereof were printed under my supervision pursuant to the provisions of rule 23 of the rules of practice of the said the United States Circuit Court of Appeals for the Ninth Circuit, and as the said original remains of record in my office.

Attest my hand and the seal of the said United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this third day of December, A. D. 1908.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

687 United States Circuit Court of Appeals for the Ninth Circuit.
No. 1423.

J. N. BEAN et al., Appellants,
vs.
W. A. MORRIS, Complainant, and T. N. HOWELL, Intervener, et al.,
Appellees.

ADDENDA.

Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.

688 At a Stated Term, to wit, the October Term, A. D. 1906, of the United States Circuit Court of Appeals for the Ninth Circuit, Held at the Courtroom, in the City and County of San Francisco, on Wednesday, the Fifteenth Day of May, in the Year of Our Lord One Thousand Nine Hundred and Seven.

Present: The Honorable William B. Gilbert, Circuit Judge; Honorable John J. De Haven, District Judge; Honorable William H. Hunt, District Judge.

No. 1423.

J. N. BEAN et al., Appellants,
vs.
W. A. MORRIS, Complainant, and T. N. HOWELL, Intervener, and
JOHN SADRING et al., Defendants, Appellees.

Order Denying Motion to Dismiss Appeal, Order of Submission, etc.

Ordered, motion of counsel for the appellees to dismiss the appeal in the above-entitled cause argued by Mr. O. W. McConnell, counsel for the appellees and the motion, and Mr. T. J. Walsh, counsel for the appellants and in opposition to the motion, and submitted to the Court for consideration and decision.

Thereupon, upon due consideration thereof, and the Court
689 being fully advised in the premises, it is ordered that the appellants be, and hereby are, allowed to file a further bond on appeal in the above-entitled cause, and that the said motion be and hereby is denied.

Thereupon, the appeal in the above-entitled cause was argued by Mr. Walsh, counsel for the appellants, and Mr. McConnell, counsel for the appellees, and submitted to the Court for consideration and decision.

the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1423.

J. N. BEAN et al., Appellants,

vs.

W. A. MORRIS, Complainant et al., Appellees.

on Appeal from the United States Circuit Court for the District of Montana.

Opinion of U. S. Circuit Court of Appeals.

George W. Pierson and Walsh & Nolan, for Appellants.
McConnell & McConnell and J. R. Goss, for Appellees.

before Gilbert, Circuit Judge, and De Haven and Hunt, District Judges.

DE HAVEN, *District Judge*:

This is an appeal by certain defendants from a final decree in equity entered in the Circuit Court of the United States for the District of Montana. The bill of complaint alleges that the complainant is a citizen of Wyoming, and that in the year 1887 he acquired a water right of 250 inches, statutory measurement, by diverting the waters of Sage Creek on to lands then occupied and now owned by him in that state; that such diversion was made in the State of Wyoming; that the defendants are citizens of the State of Montana, and that they had for three years prior to the commencement of this suit, during irrigation seasons, diverted the waters of said Sage Creek and its tributaries, at points on the stream above complainant's point of diversion; that said diversion was made by the defendants in the State of Montana, and that such acts of diversion resulted in damage to him in the sum of \$2,500. The bill prayed for an injunction and for damages.

The defendants Bean, Bainbridge, S. W. Bent, Wallace Bent and Corbett Bennett, who are the appellants here, filed an answer in which they denied that complainant ever made any appropriation of the waters of Sage Creek, or that he ever diverted the waters of said stream to or upon the lands described in the bill of complaint, prior to the month of November, 1895. They admitted the diversion by them of the waters of Sage Creek and its tributaries, as alleged in the complaint, but denied that complainant suffered any damage thereby. They further aver that the alleged diversion by them was in Montana, and for the purpose of irrigating lands owned or occupied by them in that state. These lands were alleged to be unsurveyed lands which would be subject to entry under the homestead laws when surveyed; that each of defendants is a qualified homesteader, and that he intends to enter the lands occupied by him as soon as the same shall be surveyed. The defendants

further averred that each relying upon his appropriation, cultivated his lands and improved them by the erection of houses, barns, etc.; that the lands are unproductive and valueless, unless they can be irrigated.

As a further defense, they alleged an adverse use of the waters by them during the irrigation season for a period of more than ten years, and further that by reason of the peculiar condition of the bed of Sage Creek and its tributaries, the water sinks in places and rises in others, and that in consequence of this the complainant has had as much water during the period of which he complains as he ever used.

One T. N. Howell, who in his petition alleged himself to be a citizen of the State of Wyoming, was permitted to intervene, all of the parties consenting thereto. The cause of action set forth in his petition was of the same general character as that alleged in the bill of complainant; the intervenor alleging that on August 1, 1890, he appropriated from the waters of Sage Creek in the State of Wyoming $6\frac{1}{4}$ cubic feet per second; that his appropriation was prior to that of the defendants, but subject to the right of the complainant. He further alleged that he had enjoyed the use of the waters so appropriated by him without disturbance until about two years before

the filing of his petition in intervention, when the defendants
692 began to use the water of said stream in Montana to such an extent as to deprive him of the use of the waters so appropriated.

Answers were made by the same defendants identical in general character with the answers to the bill, and specifically putting in issue intervenor's allegation of his Wyoming citizenship, and averring, on information and belief, that he is a citizen of Montana.

The court upon consideration of the evidence, filed its findings of fact, and made and entered its decree establishing the right of the complainant to one hundred inches, miner's measurement, of the waters of Sage Creek, and its tributaries, of date April, 1887, and further adjudging that the intervenor Howell is entitled to one hundred and ten inches of the waters of Sage Creek and its tributaries, miner's measurement, of date August 1, 1890; that as between the complainant and intervenor, the complainant is prior in time, and prior in right, and that both complainant and intervenor are prior in time to the defendants, and prior in right.

The decree further enjoined the defendants from in any manner interfering with the rights of the complainant and intervenor as determined in the decree; and they were further commanded to allow at all times, when needed by the complainant and intervenor, a sufficient amount of water to flow down to them to satisfy their rights.

The defendants, Bean, Bainbridge, Bennett, S. W. and Wallace Bent, appeal.

1. At the date of the complainant's diversion of the waters of Sage Creek in April, 1887, the statute of the then territory
693 of Wyoming, approved March 11, 1886, provided that one claiming a water right should file in the office of the county clerk of the proper county and in the office of the clerk of the

district court, a notice of such claim; and it was further provided that in any controversy concerning water rights no evidence should be received in behalf of any claimant until such statement or claim was filed by him. This latter provision in relation to the rejection of evidence offered by a claimant, who had not filed in the proper office the statement required by the statute, was subsequently repealed and is no longer in force.

It is conceded that the complainant never filed any notice of his claim to the waters diverted by him, as required by the territorial statute of March 11, 1886, and the appellants insist that such being the fact, he never made any valid appropriation of such water under the laws of Wyoming.

The Circuit Court held, and we think rightly, that it was not the purpose of the statute referred to, to provide an exclusive method of appropriation, and that its only effect was to take from an appropriator, who failed to file such notice, the right to claim an appropriation as of the date of the beginning of the work of diversion; the penalty for such failure being to limit the right to the time when the water is actually supplied and used."

This is the construction placed upon similar statutes in other States, requiring the filing and recordation of claims to water. *Murray v. Tingley*, 20 Mont. 260; *Wells v. Mantes et al.*, 99 Cal. 583; *Watterson v. Saldunbehere*, 101 Cal. 107.

2. It is also urged that complainant's appropriation was invalid because at the date of the initiation of his claim the headwaters of Sage Creek were within the limits of the Crow Reservation in the State of Montana; that the complainant's appropriation conferred no right upon him as against the Indians of that reservation, and that appellants have succeeded to all rights of such Indians by their settlement upon the lands then occupied by such Indians.

We think a complete answer to this contention is found in the opinion of the learned Judge presiding in the Circuit Court in which he said:

"When the right of the Indians was extinguished, and the land was thrown open to settlement, it became public, and, assenting for the sake of argument to the theory of the defendants, all that was in the way of the validity of the prior appropriations had been removed, and the appropriators in Wyoming were in point of time ahead of any claim which the defendants could possibly make, because their appropriations attached eo instanti * * * The rights of the defendants attached as settlers after the lands were made subject to settlement. They cannot antedate settlement made by them. At that time prior appropriations had been made by the complainant and intervenor, and defendants took their riparian rights subject to and charged with those appropriations."

3. Sage Creek is a non-navigable stream, the waters of which rise in the State of Montana and then flow into the State of Wyoming. The main contention of appellants, and one that has been most strongly urged in the argument and brief of their attorneys, is, that the appellees could not by prior appropriation or diversion of the waters of Sage Creek at a point within

the State of Wyoming acquire the right to continue the diversion of such waters as against a junior appropriator of the waters of the same stream, in the State of Montana.

The argument in support of this contention is based upon the proposition that the water flowing in Sage Creek within the State of Montana belongs to its citizens, and their right to divert the same at points within, and upon lands of that State, cannot be taken from them by a prior appropriation or diversion of the waters of the same stream in the State of Wyoming.

The proposition thus stated is not a new one, and has been decided adversely to the contention of appellants in *Howell v. Johnson*, 89 Fed. 556; *Morris v. Bean*, 123 Fed. 618. This Court also in *Rickey Land & Cattle Co. v. Miller & Lux*, 152 Fed. 11, in discussing the question of the jurisdiction of the Circuit Court of Nevada to quiet title to a water right, where the complainant claimed title by prior appropriation of a certain part of the flow of a river, to irrigate its lands in Nevada, and alleged that such rights were being interfered with by defendant, a junior appropriator of the waters of same stream in California, said:

696 "The water in the stream, which has a propensity to seek its level, and will continue in its current to the sea, is in strict reality the veritable thing in controversy. It knows no imaginary State or county lines, and is a thing in which no man has a property until captured to be applied to a beneficial use. The right of appropriation is recognized in law, which means the right of diversion and use. It is the right, not to any specific water, but to some definite quantity of that which may at any time be running in the stream. So the right acquired by an appropriation includes the right to have the water flow in the stream to the point of diversion. The fact of a State line intersecting the stream does not, within itself, impinge upon that right. In other words, the appropriation may still be acquired although the stream is interstate and not local to one State; nor will the mere fact that the stream has its source in one State authorize a diversion of all the water thereof as against an earlier and prior appropriator across the line in another State. On the contrary, one who has acquired a right to the water of a stream by prior appropriation, in accordance with the laws of the State where made, is protected in such right as against subsequent appropriators, though the latter withdraw the water within the limits of a different state."

It is not deemed necessary to add anything to this statement of the law. The right to divert or appropriate for a useful purpose, the waters of a non-navigable stream, is recognized by the laws of Montana and Wyoming, and by sections 2339 and 2340 of the Revised Statutes; and the broad principle which underlies 697 the relative rights of appropriators from the same stream, is, that whoever is first in time is first in right, and the fact that the stream, the waters of which are appropriated, is interstate and non-navigable, does not affect the rule.

4. Other questions argued by appellants, such as the alleged laches of the complainant, abandonment, adverse user by defendant, in-

iciency of the evidence to justify the decree, as to the number inches of water actually appropriated by the complainant and intervenor, do not require discussion. It is sufficient to say, we find error in the record, and the decree is therefore affirmed.

Endorsed:| No. 1423. United States Circuit Court of Appeals, the Ninth Circuit. J. N. Bean et al. vs. W. A. Morris, etc., et al. d Feb. 3, 1908. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1423.

N. BEAN, W. R. BAINBRIDGE, S. W. BENT, WALLACE BENT, and CORBETT BENNETT, Appellants,

vs.

A. MORRIS, Complainant, and T. N. HOWELL, Intervenor, and John Sadring, L. O. Dilts, Allen P. Graham, William Eley, Curtis Beeler, Charles Ingram, C. Runyan, William Scholtz, C. E. Steele, John Rhodes, F. Banderoff, O. S. Erickson, Tillman C. Graham, James Pauley, C. M. Brown, John Bowler, J. A. King, A. Holm, C. H. Young, and Michael Wrote, Defendants, Appellees.

Appeal from the Circuit Court of the United States for the District of Montana.

Decree of U. S. Circuit Court of Appeals.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States, for the District of Montana, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs to the appellee.

[Endorsed:] Decree. Filed and Entered February 3, 1908. F. D. Monckton, Clerk.

700 United States Circuit Court of Appeals for the Ninth Circuit

No. 1423.

J. N. BEAN et al., Appellants,

vs.

W. A. MORRIS, Complainant, and T. N. HOWELL, Intervenor, et al.
Appellees.

*Certificate of Clerk U. S. Circuit Court of Appeals to Proceedings
and Record.*

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, do hereby certify the foregoing fourteen (14) pages, numbered from one (1) to fourteen (14), inclusive, to be a true copy of all proceedings had in the above-entitled case in the said the United States Circuit Court of Appeals for the Ninth Circuit as the same remain of record in my office, and that the same in connection with the preceding certified copy of the printed Transcript of Record in the above-entitled case constitute a true copy of the entire record therein.

Attest my hand and the seal of the said the United States Circuit Court of Appeals, for the Ninth Circuit, at the City of San Francisco, in the State of California, this third day of December, A. D. 1908.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

701 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America, to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Being informed that there is now pending before you a suit in which J. N. Bean, W. R. Bainbridge, S. W. Bent, Wallace Bent and Corbett Bennett are appellants and W. A. Morris et al. are appellees, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the Circuit Court of the United States for the — District of Montana, and we, being willing for certain reasons that the said cause and the record and proceedings therein should

702 be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 21st day of January, in the year of our Lord one thousand nine hundred nine.

JAMES H. MCKENNEY,

Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 21,460. Supreme Court of the United States. No. 664, October Term, 1909. J. N. Bean vs. W. A. Morris et al. Docketed. No. 1423. United States Circuit Court of Appeals for the Ninth Circuit. Writ of Certiorari. Feb. 10, 1909. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

J. N. BEAN, W. R. BAINBRIDGE, S. W. BENT, WALLACE BENT, and CORBETT BENNETT, Appellants,

vs.

A. MORRIS, Complainant, and T. N. HOWELL, Intervenor, and John Sadring, L. O. Dilts, Allen P. Graham, William Eley, Curtis Seeler, Charles Ingram, C. Runyan, William Scholtz, C. E. Steele, John Rhodes, F. Banderof, O. S. Erickson, Tillman C. Graham, James Pauley, C. M. Brown, John Bowler, J. A. King, A. Holm, J. H. Young, and Michael Wrote, Defendants, Appellees.

Stipulation.

Whereas, an application for writ of certiorari was made in the above entitled cause to the Supreme Court of the United States, pursuant to which such writ was on the 21st day of January, A. D. 1909, issued out of the said Supreme Court of the United States; and Whereas, there was filed with the said petition for the writ of certiorari in the office of the clerk of the Supreme Court of the United States nine copies of the printed transcript on appeal, as the same was filed in this court, together with an equal number of printed copies of the record in this court; and

Whereas, appellees above named have been supplied with copies of such printed records:

Now, therefore, it is hereby stipulated that the clerk of this court may, in obedience to the said writ of certiorari, transmit a certified copy of this stipulation, and that the same may be filed in the office of the clerk of the Supreme Court of the United States with the same force and effect as though a full transcript of the record had been transmitted and filed pursuant to the said writ, and it is further stipulated that no further printing of the record in the office of the clerk of the Supreme Court of the United States shall be required or insisted upon by the appellees herein.

Dated this 3rd day of February, A. D. 1909, Helena, Montana.

GEORGE W. PIERSON,

WALSH & NOLAN,

Solicitors for Appellants.

O. W. McCONNELL,

McCONNELL & McCONNELL,

Solicitors for Appellees.

706 [Endorsed:] No. 1423. United States Circuit Court of Appeals for the Ninth Circuit. J. N. Bean et al. Appellants vs. W. A. Morris et al. Appellees. Stipulation of counsel relative to return to writ of certiorari. Filed Feb. 10, 1909. F. D. Monckton, clerk. George W. Pierson and Walsh & Nolan, Solicitors for Appellants. N. W. McConnell and O. W. McConnell, Solicitors for Appellees.

707 United States Circuit Court of Appeals for the Ninth Circuit,

No. 1423.

J. N. BEAN et al., Appellants,

vs.

W. A. MORRIS, Complainant, et al., Appellees.

Certificate of Clerk United States Circuit Court of Appeals to Stipulation of Counsel Relative to Return to Writ of Certiorari.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the next preceding three (3) pages, numbered from one (1) to three (3), both inclusive, to be a true copy of a "Stipulation of Counsel Relative to Return to Writ of Certiorari," filed in the above-entitled cause on the 10th day of February, A. D. 1909, as the original thereof remains on file and of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 10th day of February, A. D. 1909.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. W. MONCKTON, *Clerk.*

708 United States Circuit Court of Appeals for the Ninth Circuit,

No. 1423.

J. N. BEAN et al., Appellants,

vs.

W. A. MORRIS, Complainant, et al., Appellees.

Return to Writ of Certiorari.

By direction of the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton, as Clerk of the said Court, in obedience to the annexed Writ of Certiorari issued out of the Honorable the Supreme Court of the United States and addressed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them to send, without delay, to the said Supreme Court the

rd and proceedings in the above-entitled cause, do attach to the
Writ a certified copy of a stipulation entered into by and be-
en the counsel for the respective parties to the said cause, the
ginal of which stipulation is on file and of record in my office, and
hereby certify the said stipulation as due return to the said writ.
n testimony whereof, I have hereunto set my hand and affixed
seal of the said United States Circuit Court of Appeals for the
th Circuit, at the City of San Francisco, in the State of Cali-
nia, this 10th day of February, A. D. 1909.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk*.

[Endorsed:] File No. 21,460. Supreme Court U. S., Octo-
ber Term, 1910. Term No. 122. J. N. Bean et al., Petition-
vs. W. A. Morris et al. Writ of Certiorari and return. Filed
y 20th, 1909.

122.

No. 655

U.S. Supreme Court
FILED
DEC 23 1908
JAMES M. McKEN

IN THE
Supreme Court of the United States
OCTOBER TERM, 1908.

No. _____

J. N. DEAN, W. B. BAINBRIDGE, & W. HENT,
WALLACE HENT and CORBETT BENNETT,
Petitioners,

vs.

W. A. MORRIS and T. N. HOWELL,
Respondents.

PETITION FOR WRIT OF HABEAS CORPUS TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

THOMAS J. WALSH,
CORNELIUS B. NOLAN,
GEORGE W. PIERSON,
Of Counsel for Petitioners.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1908.

J. N. BEAN, W. R. BAINBRIDGE, S. W. BENT,
WALLACE BENT and CORBETT BENNETT,

Petitioners,

vs.

W. A. MORRIS and T. N. HOWELL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

To the Honorable, the Supreme Court of the United States:

This the petition of J. N. Bean, W. R. Bainbridge, S. W. Bent, Wallace Bent and Corbett Bennett respectfully shows unto this Honorable Court, that on the 3rd day of February, 1908, the Circuit Court of Appeals of the United States for the Ninth Judicial Circuit, made and entered its decree and judgment, affirming the decree of the United States Circuit Court for the District of Montana, in the case of W. A. Morris, Complainant and Appellee, versus J. N. Bean, W. R. Bainbridge, Bert Bent, Wallace Bent, Corbett Bennett (Appellants), John Sad-

ring, L. O. Dilts, Allen P. Graham, William Eley, Curtis Beeler, Charles Ingram, C. Runyan, William Sholtz, C. E. Steele, John Rhodes, F. Banderof, O. S. Erickson, Tillman C. Graham, James Pauley, C. M. Brown, John Bowler, J. A. King, A. Holm, C. H. Young and Michael Wrote Appellees), Defendants, T. N. Howell, Intervenor, (entitled in the printed transcript on file in the United States Circuit Court of Appeals for the Ninth Circuit, as follows: J. N. Bean, W. R. Bainbridge, S. W. Bent, Wallace Bent and Corbett Bennett, Appellants, versus W. A. Morris, Complainant and T. N. Howell, Intervenor, and John Sadring, L. O. Dilts, Allen P. Graham, William Eley, Curtis Beeler, Charles Ingram, C. Runyan, William Sholtz, C. E. Steele, John Rhodes, F. Banderof, O. S. Erickson, Tillman C. Graham, James Pauley, C. M. Brown, John Bowler, J. A. King, A. Holm, C. H. Young and Michael Wrote, Defendants, Appellees).

That among the questions presented by the record in the said cause and submitted for consideration to the said Circuit Court of Appeals are the following, to-wit:

1. Whether citizens of one state, appropriating water from a stream which has its source in another state, within the state of their residence, for use on lands within such state, may maintain an action in equity in a United States Circuit Court, sitting in the state in which is the source of the stream, to enjoin citizens of that state claiming to have appropriated the waters of the stream under its laws for the irrigation of lands within the state of their resi-

dence from diverting and using for such purposes the same in the state of their residence.

2. Whether, if under ordinary conditions such an action could be maintained, it can be supported in a case in which the citizens of the state, in which are the head-waters of the stream, were denied an opportunity to make earlier appropriations of its waters by reason of the fact that the entire region within which were such head-waters was within an Indian reservation, out of which the stream flowed directly into the state within whose territory and under whose laws the complainant's appropriation was made.

3. Whether in such action (purely in personam if maintainable at all) one who is a citizen of the state in which the action is brought, and of which the defendants are citizens, but who claims to have made an appropriation from the stream in the same state as did the complainant, that is to say, beyond the borders of the state in which the court sits, may be permitted to intervene in the action and try therein the question of priority of right between himself and the defendants, citizens of the same state with him.

4. Whether under a complaint filed in the United States Circuit Court to establish a prior right to the waters of the stream and to enjoin the defendants, appropriators above, from diverting the water of the stream, that court acquires any jurisdiction, when the bill of complaint avers that the water right asserted by the complainant is of the value of \$2,000, though it is also averred

that the complainant has been damaged in the sum of \$2,500 by reason of the defendants' interferences with his water right.

These important questions of great public interest arise as follows:

On January 20, 1903, W. A. Morris, above named, filed his bill of complaint in the United States Circuit Court for the District of Montana against J. N. Bean, W. R. Bainbridge, Bert Bent, Wallace Bent, Corbett Bennett, John Sadring, L. O. Dilts, Allen P. Graham, William Eley, Curtis Beeler, Charles Ingram, C. Runyan, William Sholtz, C. E. Steele, John Rhodes, F. Banderof, O. S. Erickson, Tillman C. Graham, James Pauley, C. M. Brown, John Bowler, J. A. King, A. Holm, C. H. Young, and Michael Wrote, in which he alleged that he was a citizen of Wyoming, and that in the year 1887 he had in that state appropriated 250 inches, miner's measurement, of the waters of Sage Creek, which he had diverted on to lands then occupied, and at the time of the filing of his bill of complaint owned by him, in the said state of Wyoming, such diversion having been made in the state of Wyoming, though the stream, Sage Creek, has its source in the county of Carbon, State of Montana, through which it flows across the state line into Wyoming. He averred that the defendants, citizens of the State of Montana, had in the irrigating season of the three years prior to the commencement of the suit, in the state of Montana, diverted the waters of Sage Creek at points on the stream above his point of diversion, and had also diverted the

water of Piney Creek, a tributary of Sage Creek, emptying into it above the head of his ditch. Such diversion also it was alleged took place in the state of Montana and resulted in damage to him in the sum of \$2,500.

The bill averred that the water right and appropriation claimed by the complainant is of the value of \$2,000. He prayed for an injunction enjoining further interference with his right, and for damages in the sum of \$2,500.

The petitioners answered denying that the complainant had made any appropriation antedating the month of November, 1895. They admitted the diversion as charged, but denied that complainant had suffered any damage. They further severally alleged appropriations by themselves of the waters of Sage Creek and Piney Creek in the State of Montana, for the irrigation of lands owned or occupied by them in Montana, through ditches in Montana. They set up the defense of estoppel, adverse user and non-user by the complainant.

After the petitioners had answered, one T. N. Howell, over their objection, was permitted to intervene, the complainant expressly consenting. His petition contained averments of the same general character as those made by the complainant in his bill. He averred a Wyoming appropriation of $6\frac{1}{4}$ cubic feet per second of the waters of Sage Creek for the irrigation of lands in Wyoming, and declared himself to be a citizen of that state. He asserted a priority of right over the defendants, but admitted the priority of the complainant to the extent $6\frac{1}{4}$ cubic feet of water

per second. He also prayed for a decree establishing his right, for an injunction, and for damages.

To the petition of the intervenor the petitioners in this court answered in manner similar to the answer made to the bill of complaint. They specifically put in issue the intervenor's allegation of his Wyoming citizenship, and averred that he is a citizen of Montana.

A general replication was filed and the case referred to a master to take testimony. On the incoming of his report the court found that Sage Creek has its source in the Pryor mountains, Carbon County, Montana, and flows in a general southerly direction through a portion of Carbon County, to and across the dividing line between Montana and Wyoming into the last mentioned state, where it falls into the Stinkingwater river, and that the appropriation of the intervenor and that of the complainant were made at a time when all of the territory drained by Sage Creek and its tributaries was a part of the Crow Indian reservation, the south line of which conformed to the south line of the State of Montana. It was further found that the complainant had appropriated 100 inches of the waters of Sage Creek in the year 1887, that the intervenor appropriated 110 inches of water from Sage Creek in 1890, and that the appropriations of the defendants, including those of the petitioners herein, were not made until 1893. The court held against the claim of adverse user, estoppel and abandonment or non-user; held that the citizenship of the intervenor was immaterial, and directed a decree awarding 100 inches of the waters of Sage Creek to the

complainant and 110 inches to the intervenor, enjoining the defendants from diverting so much as that the amount stated could not be obtained from Sage Creek by the complainant and the intervenor respectively, but denying damages. A decree was entered accordingly, and from this decree an appeal was taken to the Circuit Court of Appeals for the Ninth Judicial Circuit, resulting in an affirmance as above stated.

It is insisted in this petition that the Circuit Court of Appeals erred in its judgment and decree herein in the same particulars as did the Circuit Court, and your petitioners here assign that the Circuit Court of Appeals committed error prejudicial to your petitioners in the following particulars, to-wit:

1. It was error in the Court to find or rule that any appropriation made by either of the respondents of the waters of a stream in the State of Wyoming gave to them, or either of them, any priority over any right acquired by these petitioners or any of the defendants, under or by virtue of the laws of the State of Montana, or to the waters of any stream within the State of Montana.

2. It was error in the Court to find or rule that any appropriation made by either of the respondents of any water within the State of Wyoming, or made under the laws of Wyoming, or any right to the use of the water of any stream in the said State of Wyoming, or acquired under its laws, furnished any basis before any court sitting in the State of Montana for an injunction against these petitioners, having appropriated and acquired the

right to the use of the waters being used by them within the State of Montana, under and by virtue of the laws of the State of Montana.

3. It was error in the Court to find or rule that the Court had any jurisdiction to enforce, as against citizens of the State of Montana using waters within the State of Montana, of streams within the State of Montana, appropriated under its laws, rights claimed to have been acquired by the respondents to the use in the State of Wyoming of the waters of a stream within the State of Wyoming, acquired under and by virtue of the laws of the State of Wyoming.

4. It was error in the Court not to dismiss the petition of the respondent Howell, and it was error to grant him any relief, for that it appears that the Court has no jurisdiction of the subject matter of his petition or to grant him any relief, because he has not shown that he is or was at any time a citizen of any state other than the State of Montana, of which the defendants against whom he seeks and was granted relief are citizens.

5. It was error in the Court to grant any relief to the respondent Morris, for that the respondent Morris consenting to the respondent Howell's joining with him in the prosecution of this suit against the defendants, the respondent Howell appearing to be a citizen of the same state with defendants, the court lost jurisdiction and had no power to enter any decree except one of dismissal.

6. It was error in the Court to find or rule that any acts of the respondents in the State of Wyoming, while the

lands now owned by these petitioners were a part of the Crow Indian reservation, gave to the said respondents any priority of right to the waters of Sage Creek as against the rights of the Indians to the waters of the streams within the said reservation, or as against any person acquiring any of said lands through which any streams of said reservation might flow, and particularly as against these petitioners acquiring lands within what was the said Crow Indian Reservation, at the time of the alleged appropriations of the said respondents, on the opening of said reservation, through which flowed the streams, from making use of the waters of which the decree entered herein enjoins these petitioners.

7. It was error in the Court to hold that any acts of the respondents, towards the appropriations of the waters of any stream in the State of Wyoming gave to them any rights as against occupants of lands within what was formerly the Crow Indian Reservation, as to streams flowing through the same, antedating the time when such lands ceased to be a part of said Crow Indian Reservation.

8. It was error in the Court to find that the cause of action of neither of the respondents is barred by the Statute of Limitations.

9. It was error in the Court to find that neither of the respondents is guilty of such laches as to defeat his right to maintain this action.

10. It was error in the Court to find that neither of the respondents is estopped from maintaining this action.

11. It was error in the Court to find that neither

of the respondents has abandoned any right he ever acquired as against these petitioners to the waters of Sage Creek.

12. It was error in the Court to find or rule that the waters of said Creek, during the irrigating season do not sink in the channel thereof, above the land of either of the respondents, or that a useful quantity of the same would reach the lands of the respondents during the irrigating season, but for the diversion of the same and its tributaries by the defendants, and to fail to find or rule that the waters of said Creek, during the irrigating season, sink in its bed or channel, so that, though the defendants diverted none of the same or the waters of the tributaries of the said Sage Creek, a useful quantity thereof would not reach the lands of either of the respondents.

13. It was error in the Court to find that the respondent Morris is entitled to, or to adjudge to him, more than twenty-five inches, miner's measurement, of water, or to find that the respondent Howell is entitled to, or to adjudge to him more than forty inches, miner's measurement, of water.

14. It was error in the Court to award to either of the respondents any number of inches, "miner's measurement," for that in his bill of complaint the respondent Morris alleges an appropriation of two hundred and fifty inches "statutory measurement," and the respondent Howell six and one-fourth cubic feet per second, neither alleging an appropriation of any number of inches "miner's measurement."

15. It was error in the Court to award to either of the respondents any quantity of water measured by miner's inches, for that the standard for the measurement of water in the State of Wyoming is one cubic foot of water per second, and because a miner's inch is an uncertain and indeterminate quantity.

16. It was error in the Court to hold that the respondent Morris acquired a water right, notwithstanding he failed to comply with the laws of Wyoming in reference to the filing of a statement of his appropriation, as required by the laws of that state.

17. It was error in the Court to hold that the respondent Howell acquired a water right, notwithstanding he failed to comply with the laws of Wyoming by filing an application and obtaining a permit, as required by Section 34 of the Act of the Legislative Assembly of the State of Wyoming approved December 22, 1890.

18. It was error in the Court to hold it unnecessary for either of the respondents to make proof that their appropriations respectively were made either on the public domain or on private lands, with the consent of the owner of such lands.

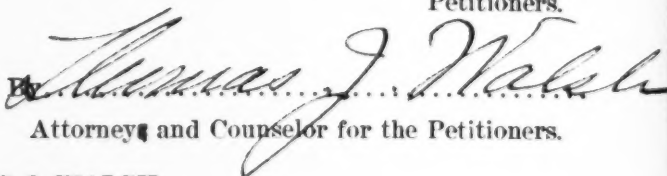
19. It was error in the Court to hold that the amount in controversy exceeded \$2,000.00.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this honorable court, directed to the United States Circuit Court of Appeals, for the Ninth Circuit, commanding said court to certify and send to this court,

on a day certain therein to be designated, a full and complete transcript of the record of all proceedings of said Circuit Court of Appeals therein, to the end that the said cause may be reviewed and determined by this Court, as provided in Section 6 of the Act of Congress, entitled "An Act to establish circuit courts of appeal, and to define and regulate in certain cases the jurisdiction of the court of the United States, and for other purposes," approved March 3, 1891, and that your petitioners may have such other or further relief or remedy in the premises as to this court may seem proper and in conformity with said act, and that the judgment and decree of the said Circuit Court of Appeals in said case, and every part thereof, may be reversed by this honorable court. And your petitioners will ever pray.

J. N. BEAN,
W. R. BAINBRIDGE,
S. W. BENT,
WALLACE BENT and
CORBETT BENNETT,

Petitioners.


Attorney and Counselor for the Petitioners.

THOMAS J. WALSH,
CORNELIUS B. NOLAN,
GEORGE W. PIERSON,
Of Counsel for Petitioners.

122.

FILED.

DEC 38 1908

No. ~~122~~

JAMES H. MCKENNEY,

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1908.

J. N. BEAN, W. B. BAINBRIDGE, S. W. BENT,
WALLACE BENT and CORBETT BENNETT,
Petitioners.

vs.

W. A. MORRIS and T. N. HOWELL,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR
CERTIORARI.

WALSH & NOLAN, and
GEORGE W. PIERSON,
Solicitors for Petitioners.

THOMAS J. WALSH,
Counsel for Petitioners.

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**BRIEF IN SUPPORT OF PETITION FOR
CERTIORARI.**

The petitioners ask a review of the decree of the Circuit Court of Appeals in this case because of the great public importance of at least four of the legal questions involved, specified in the petition herein, with regard to three of which the opinion filed by that learned court is entirely silent.

For the detailed discussion of the propositions which it is respectfully submitted are of such grave moment as to invite consideration by this court, it is respectfully referred to the brief in the Circuit Court of Appeals and presented with this brief. Scarcely anything more is here attempted than a statement of the grounds upon which the petitioners base their claim that the learned court

hearing the matter on appeal erred in its affirmance of the decree.

1. *The Source of the Right of Appropriation.*—

The question of the right to maintain the suit at all goes to the very foundation of the right of appropriation of the waters of the streams in the west for the purposes of irrigation.

Two conflicting theories are advanced concerning the origin of the right. One is, that it is national in its origin; the other, that it comes from the state. The first theory holds that the national government, by reason of its ownership of the public lands, owns all the waters of the innavigable streams that flow through those lands, and that it grants to appropriators of water the right to the use of the same by virtue of the act of July 26, 1866, and subsequent acts of Congress. If that theory is correct, it is manifest that state lines may be neglected, as county lines within a state would be, in controversies over water rights, except as the state laws might prescribe the particular steps to be taken to secure the right of appropriation. The other theory holds to the view that the *state* and not the *national* government owns the waters of such streams within its borders, and that it disposes of those waters by virtue of its own laws, either by giving rights in them to appropriators or to riparian proprietors, according to such policy as it may see fit to pursue.

If that view be accepted, it follows that the respondents in this case got whatever rights they have from the State of Wyoming in the disposition of property owned by

it, and that the petitioners got such rights as they have from the State of Montana in the disposition of property owned by it; that the State of Wyoming had no power or authority to dispose of rights to the waters of streams in Montana and did not undertake to do so, and that when the State of Montana granted certain rights to the petitioners in the waters of streams within its borders, those rights were taken by them without prejudice on account of any earlier grants by the State of Wyoming to its citizens of the waters of the same stream within that state.

The conflicting views are made clear by the following extracts from opinions of the federal and the state courts, respectively, by which the subject has been considered.

First, expressions from the federal courts.

"The national government is the proprietor and owner of all the land in Wyoming and Montana which it has not sold or granted to some one competent to take and hold the same. Being the owner of these lands, it has the power to sell or dispose of any estate therein or any part thereof. The water in an innavigable stream flowing over the public domain is a part thereof, and the national government can sell or grant the same, or the use thereof, separate from the rest of the estate, under such conditions as may seem proper."

U. S. District Judge Knowles in

Howell vs. Johnson, 89 Fed. 556.

"It is urged that in some way the state of Montana has some right in these waters in Sage Creek or some control over the same. It never purchased them. It never owned them. * * * In that case (St. Anthony Falls Water Power Co. v. Board of Water Com'rs of St. Paul, 18 Sup. Ct. 157) it was not held, nor was it held in any of the cases cited in the decision therein, that the rights of the owner of the

land through which any navigable stream flowed, within the boundaries of the state, depended upon the laws of such state, or that the said owners' right to such waters depended upon such laws, as against one who claimed a right to the same under the laws of congress. To so hold would uphold the view that a state might interfere with the primary disposal of the land of the national government. When a party has obtained title to property from the national government, the state government has no right to destroy that title, except under the power of eminent domain. The state of Montana cannot step in, and say, 'The right to the water of Sage Creek, which the plaintiff acquired under the laws of congress, you cannot exercise in this state.'"

Id.

Now from the Supreme Court of Wyoming, whose constitution provides that "The waters of all natural streams, springs, lakes, or other collections of still water, within the boundaries of the state are hereby declared to be the property of the state."

Touching this provison it is said in

Farm Investment Co. vs. Carpenter, 9 Wy. 110,
61 Pac. 258;

"At the outset, however, it is strenuously insisted that the declaration contained in the constitution, that the waters of the natural streams, etc., are the property of the state, is meaningless and of no force and effect. It is argued that the state no more than an individual can acquire property by a mere assertion of ownership, and that the United States, as the primary owner of the soil, is also primarily possessed of title to the waters of the streams flowing across the public lands. This contention demands more than a passing notice. * * * Under the doctrine of prior appropriation, it would seem essential that the property in waters affected by that doctrine should reside in the public, rather than constitute an incident to the ownership of the adjacent lands. Such waters

are, we think, generally regarded as public in character. By the civil law the waters of all natural streams were *publici juris*, and, according to Bracton, that was the rule anciently in England. *Kin. Irr. Sec. 53*; *Gould, Waters, Sec. 6*. At the modern common law, public waters are generally confined to those which are navigable, and public rights therein to navigation and fishery, and privileges incident thereto. In the arid region of this country another public use has been recognized by custom and laws, and sanctioned by the courts,—a public use sufficient to support the exercise of the power of eminent domain. *Irrigation Dist. v. Bradley*, 164 U. S. 112, 160, 17 Sup. Ct. 56, 41 L. Ed. 369. This use and the doctrine supporting it are founded upon the necessities growing out of natural conditions, and are absolutely essential to the development of the material resources of the country. Any other rule would offer an effectual obstacle to the settlement and growth of this region, and render the lands incapable of continued successful cultivation. The waters for the reclamation of the desert lands must be obtained, in a very large measure, from the natural streams and other natural bodies of water. The common-law doctrine of riparian rights relating to the use of the water of natural streams and other natural bodies of water not prevailing, but the opposite thereof, and one inconsistent therewith, having been affirmed and asserted by custom, laws, and decisions of courts, and the rule adopted permitting the acquisition of rights by appropriation, the waters affected thereby become, perforce, *publici juris*. It is therefore doubtful whether an express constitutional or statutory declaration is required in the first place to render them public. In a country where doctrine of prior appropriation has at all times been recognized and maintained, an expression by constitution or statute that the waters subject to appropriation are public, or the property of the public, would seem rather to declare and confirm a principle already existing, than to announce a new one. But, however, this may be, we entertain no doubt of the power of the people in their organic law, when existing vested rights are not unconstitutionally interfered with, to declare the waters of all natural streams and other natural bodies

of water to be the property of the public or of the state."

The court invites attention to a similar legislative declaration in Arizona and Nevada and to the fact that the people of Colorado made a similar assertion through their constitution in reference to which the Supreme Court of that state said, in

Wheeler vs. Irrigation Co., 10 Col. 582, 17 Pac. 487;

"Our constitution dedicates all unappropriated water in the natural streams of the state to the use of the people, the ownership there of being vested in the public. We shall presently see that after appropriation the title to this water, save, perhaps, as to the limited quantity that may be actually flowing in the consumer's ditch or lateral remains in the general public, while the paramount right to its use, unless forfeited, continues in the appropriator."

And in

Ft. Morgan L. & Co. Co. vs. South Platte Co., 18 Col. 1, 30 Pac. 1032;

"Under our constitution, the water of every natural stream in this state is deemed to be the property of the public. Private ownership of water in the natural streams is not recognized. The right to divert water therefrom and apply the same to beneficial uses is, however, expressly guaranteed. By such diversion and use a priority of right to the use of the water may be acquired."

A similar declaration as to the state's ownership of the waters within it is made in the constitution of North Dakota.

North Dakota Const., Art. 17, Sec. 210.

A most instructive consideration of this subject and

the conflicting opinions of courts touching it will be found in

1 Farnham on Waters, 135 to 136a,
and in

2 Farnham on Waters, 649 to 652.

Neither the constitution nor the statutes of Montana contain any express declaration on the subject, but the Supreme Court of that state said in

Smith vs. Denniff, 24 Mont. 20,

that "the state of Montana has by necessary implication assumed to itself the ownership, *sub modo*, of the rivers and streams of this state, and, by section 1880 et seq. of the Civil Code, has expressly granted the right to appropriate the waters of such streams, which right, if properly exercised in compliance with the requirements of the statutes, vests in the appropriator full legal title to the use of such waters by virtue of the grant made by this state as owner of the water."

With one accord the states of the arid region deny that the grantee of land from the government gets any right to the waters flowing through or along it, and assert that such waters belong to and remain in the state; that the state has the right to say and does say whether those waters shall be enjoyed by the riprarian proprietors in accordance with the rule of the common law, or be enjoyed by those who may divert and appropriate them. They declare that the water rights do not originate in grant from the general government by virtue of the act of 1866, but that that act merely, as has been repeatedly declared by the Supreme Court of the United States, recognized pre-existing rights.

Forbes vs. Gracey, 94 U. S. 762;
Jennison vs. Kirk, 98 U. S. 453;
Broder vs. Water Co., 101 U. S. 274.

If it be true that the rights existed before there was any legislation whatever on the subject by Congress, in what did they originate? Clearly in the local law. But neither a state nor any subdivision of the state has any power to dispose of the public lands. That power is vested, by the express provisions of the constitution, in Congress. The deduction is inevitable that if these rights were in existence prior to the time that Congress acted at all, they must have been derived from some authority other than Congress.

The act of 1866 was simply a formal renunciation on the part of the United States of any claim it or its grantees might have to the continued flow in the stream of water that had been appropriated, assuming that it or they had any such. It was, as disclosed by its very terms, a statute of repose, not of grant. Nor can we imagine, as seems to be intimated in *Howell vs. Johnson*, that by this statute power was delegated to the local legislatures to enact laws looking to the disposition of the waters of the streams on the public domain. If such waters are indeed incidents of the lands or the right to use such waters incident to the lands over which they flow, such a delegation of power to legislate on a subject confided by the constitution exclusively to Congress would be void.

That the state owns the navigable waters within its borders and the soil under them is not open to question.

Shively vs. Bowlby, 152 U. S. 1.

On acquiring new territory, the general government becomes invested with the title to such waters and lands, but holds them, not as it holds the general body of the public domain, subject to disposition for the benefit of the general treasury, but in trust for the people of the state or states, which may ultimately be formed out of the new territory, which state or states, on being admitted, have the absolute right of disposition of such lands and waters,

Id. pages 48 and 49,
without any permission from Congress.

And why has the state the title to navigable waters and the soil under them? Plainly because such waters are devoted to a public use as public highways. It is not necessary to go beyond *Shively vs. Bowlby*, to find an answer to this question.

Now, in the arid regions, irrigation is a public use of importance no less than is navigation in the more humid sections. The great empires now arising in majesty out of the heart of the American Desert, could never have been heard of, as their courts have declared, were it not that their waters have been held devoted to this great public use. The Supreme Court of the United States did not hesitate to say in

Fallbrooke Irrig. Dist. vs. Bradley, 164 U. S. 112-
164,

“We have no doubt that the irrigation of really arid lands is a public purpose, and the water thus used is put to a public use.” It is declared to be such by the constitution and statutes of nearly every western state.

Now if the state owns the navigable waters within its borders, because they are devoted to a public use, why does it not equally own the non-navigable waters in those states where they are, and, since civilization had its feeble beginnings within their territory, have been devoted to a public use?

It is alone upon this theory that the legislation of the western states, prescribing the manner and conditions of the acquisition of a water right can be justified. If the general government owns the waters of the streams flowing through the public domain, what right has a state to pass laws looking to their disposition? Why must one adhere to the laws of Montana or of Wyoming in the acquisition of a water right in those states, respectively, if the property right to be acquired belongs neither to the one nor to the other, but to the United States? Are all these laws, truly enacted with reference to a subject matter of which the states have no jurisdiction whatever? Not at all. They are legislating with reference to the disposition of their own property and their own rights, and Congress recognized this in the Act of 1866. The validity of legislation of this character was upheld in

Gutierrez vs. Albuquerque Land & Irrig. Co., 188
U. S. 545.

Now if the respondents must look to the State of Wyoming for whatever rights they have to the waters of Sage Creek, it follows logically that they have no water right which they can assert against these petitioners. If the State of Wyoming owns all the waters in that state, it

follows, "as the night the day," that the State of Montana owns all the waters in that state; that neither the one nor the other enjoys any priority, and that neither can grant any priority as against the other, nor any of its grantees. This theory of the ownership of water rights contemplates that from the beginning the waters were held in trust for the people of the state that was to be, and which eventually became the owner when it came into existence. Montana owns all the waters within its borders, and Wyoming owns all the waters within its borders, each being entitled to dispose of them as it sees fit.

A recent decision by the Court of Errors and Appeals of the State of New Jersey asserts the ownership by the state of the waters of running streams within it, subject to the limited right of riparian proprietors, as is seen by the following language from the opinion.

"Since the exercise of all rights of private ownership, by all riparian owners, still leaves the stream to remain as a running stream, there remains a residuum of comon or public ownership that, under our system, rests in the state as a trustee for all the people."

McCarter vs. Hudson County Water Co., 65 At.
489-496.

In that case an act forbidding the diversion of the waters of the streams of New Jersey to supply cities of adjacent states was sustained. On writ of error to this court the validity of the act was upheld.

Hudson County Water Co. vs. McCarter, 209 U.
S. 349.

The view of the ownership by the state of the waters

of the streams within its territory, subject, of course, to the control by the national government of navigable streams, under the power to regulate commerce, as distinguished from the view that the waters of all the streams in the public land states belong to the nation as an incident of its ownership of the public lands, has never received the consideration in connection with cases like the one which this court is asked to review that its importance demands.

It will be conceded that the federal government, as an owner of land, has no greater rights than any other owner of land. If the private riparian owners in the State of New Jersey have no such absolute right in and to the waters of the streams of that state, as will enable them to confer upon their grantee the right to take those waters out of the state—that is, the right of absolute disposition—neither have the United States any such right of absolute disposition as to the waters of streams towards which they sustain the relation of riparian proprietors.

The question which it is hoped may be presented for consideration by this court has an importance far beyond even the immediate controversy in which it arises.

The administrative officers of the national government charged with duties in connection with the public lands are proceeding upon the assumption of absolute ownership by it of all the waters of the streams flowing over or through such lands.

The Forestry Bureau disposes of the right to the use of the water of streams within forest reserves for irriga-

tion and power purposes, considering it a "resource" of the national government. It grants "permits" (for a consideration, in the case of plants for the development of power) for the use of such waters.

"THE USE BOOK",

a publication issued by the Forest Service, says, in its introduction, "The timber, *water*, pasture, minerals, and other *resources* of the National Forests are for the use of the people. They may be obtained under reasonable conditions without delay."

The same book says—page 36—"The Secretary of Agriculture has entire jurisdiction over the National Forests, except in matters of surveying and title. He can not convey any kind or degree of title to the land itself. He has authority to grant permits for the occupancy of lands and the use of *resources* of National Forests."

Accordingly, Regulation 6 provides: "Permits are necessary for all occupancy, *uses*, operations or enterprises of any kind within National Forests;" and

Reg. 7. * * * "The Forester may also make a reasonable charge for any permit, right, or use."

Though one should acquire the right of occupancy within a forest reserve, he could not make *use* of a *resource*, the water flowing in streams within it, without obtaining a permit. He could not divert the water of a stream by means of a ditch, carrying it to a power plant or to a farm beyond, without a permit, and the payment of such "reasonable charge" as might be exacted. The right of abso-

lute ownership is asserted. If such right can be maintained one securing a "permit" from the Forestry Bureau to do so, could, notwithstanding any state statute forbidding it, divert water from a stream within a forest reserve in one state into another state for municipal purposes or for irrigation or the development of power there. Many forest reserves embrace portions of adjacent states.

The right of the state in the waters of streams within its borders, as asserted in the McCarter case, has never had a hearing or, at least, apparently, serious consideration from the courts that have considered the right of a citizen of one state to come within another to enjoin a citizen of the latter from making use of the water of a stream, by authority of the laws of his own state, on the claim of the complainant that he has an earlier appropriation made in the state of his residence.

It was presented to Judge Knowles in *Howell vs. Johnson*, 89 Fed. 556, (which, by the way, was the same controversy as is here involved, practically between the same parties,) but he assumed as an indisputable proposition that "The water in an innavigable stream flowing over the public domain is a part thereof, and the national government can sell, or grant the same, or the use thereof, separate from the rest of the state under such conditions as may seem to it proper."

Under that view of the law, the federal government could sell the water of a stream flowing through a forest reserve in the State of Idaho to the City of Salt Lake, or to a corporation supplying it or its people with water, and

the diversion could be accomplished in defiance of any law the people of Idaho might pass.

Holding to that view of the absolute and unlimited right in the federal government to make disposition of the waters of streams in the public land states, he easily held that state lines were to be disregarded in the consideration of conflicting rights. He adhered to this view when the contentions of the parties were renewed in this case.

Morris vs. Bean, 123 Fed. 618.

His ruling was adopted by Judge Morrow, without any expressed comparison of the opposing theory, in

Anderson vs. Bassman, 140 Fed. 14.

Whether it was even presented to the court does not appear from the opinion, and if it was urged before the Circuit Court of Appeals for the Ninth Circuit, in

Rickey L. & Co. Co. vs. Miller, 152 Fed. 11,

no intimation is given that it had the attention of the court. Though that learned court was earnestly appealed to, in the cause now sought to be reviewed, to enter upon a consideration of the foundation of the right of appropriation, it contented itself with simply referring to its ruling in Rickey L. & Co. Co. vs. Miller. Judge Hailett held in

Hoge vs. Eaton, 135 Fed. 411,

that state lines are immaterial in these controversies, referring simply to the conclusion of Judge Knowles in Howell vs. Johnson.

The Supreme Court of Wyoming having repudiated his idea of federal ownership of the waters of the streams of the public land states, in Farm Inv. Co. vs. Carpenter,

61 Pac. 288, with strange inconsistency, makes his decision in *Howell vs. Johnson* the basis of the conclusion it reaches on a question related to the one presented by this record in *Willey vs. Decker*, 73 Pac. 210.

Considerations innumerable invite a speedy determination by this court of the basic principles involved in the conflicting contentions of the parties to this litigation. Problems depending for their proper solution upon the correct apprehension of them are continually arising in connection with congressional action of importance to all sections of the country, but particularly to the rapidly developing west.

The two theories of the ownership of the waters of the streams flowing over or through the public lands have been the subject of earnest discussion in Congress. See "Hearings Before the Committee on Interstate and Foreign Commerce of the House of Representatives on H. R. 15,444, extending the Time for Constructing a Dam across Rainy River," particularly the speech of Hon. Henry M. Teller in the United States Senate, found at page 35, and the Statement of Hon. James R. Garfield, Secretary of the Interior, at page 87.

The petitioners respectfully ask an opportunity to present to this court that the states respectively and not the national government own the waters of the streams within their borders, and that the right to the use of the water from such streams, though they flow over or through public lands, comes from the state and not from the nation.

2. *The Wyoming Appropriators should have no Pri-*

ority because Montana's citizens were denied an Opportunity to appropriate in their State because of the existence of the Crow Indian Reservation.

In the course of the congressional debates above referred to it was contended that the court had decided in *Kansas vs. Colorado*, 206 U. S. 46, that the state owned the waters of streams within it. Counsel for the petitioners do not feel able to assert that it was so decided. But the court did determine that, at least when appealed to for the writ of injunction, it would consider the general equities of the case, and that neither party could demand that it be decreed to have all the water of the stream regardless of the needs of the other.

The additional equity in favor of the Montana appropriators arises out of the fact that the stream in question drains a region which, until immediately before the petitioners made their appropriations, was a part of the Crow Indian Reservation.

— By the treaty of 1890 the lands occupied and owned by the petitioners and watered by them from Sage Creek, as well as the head waters of that stream, were thrown open to settlement. Theretofore, no one was permitted to go within that region to acquire either lands or water. The citizens and settlers of Wyoming might occupy the territory right up to the Montana line for a stretch from the 107th Meridian West, to where the Yellowstone River crosses it, a distance of 150 miles, and might, if the contention of the appellant is correct, appropriate every drop of water collected in that vast and now marvelously pro-

ductive and wealthy region, which should flow southward, leaving it, when it should eventually be open to settlement, a parched and hopeless desert. By what right may the citizens of Wyoming thus claim a priority in these waters over those of Montana? If they may, our state is most grievously burdened by its even now vast Indian Reservations. When they are eventually opened, as they are now fast being, we may find that citizens of other states have, by virtue of acts done therein, acquired the right to come within our state and appeal to the courts to divest the settlers on them, of the waters taken from the streams that flow through their lands, and have their sources within the newly opened territory.

Is it possible that citizens of Wyoming, under the sanction of either state or federal legislation, had the right to appropriate to themselves all the waters of the reservation by diversions made in Wyoming so that when they should eventually be thrown open to settlement, the Indians could realize nothing for their lands over and above the trifle at which they would sell for purely grazing purposes?

The suggestion made by the learned district judge of the United States Circuit Court for the District of Montana, that, assuming that the waters were not subject to appropriation prior to the opening of the reservation, the appropriations became effective *co instanti* upon the accomplishment of that fact, does not meet the case, and nothing in the decisions cited in support of this view seems to sustain it. The waters for all practical purposes are

subject to appropriation, if, immediately upon the reservation's being opened, prior appropriations take life as against those made on the land subject to entry. However diligent settlers on the newly opened land might be, they could by no possibility secure a priority.

It would appear that the Circuit Court of Appeals overlooked this feature of the case as the opinion makes no mention of it, though purporting to enumerate the various questions presented by the appellants.

3. *The Citizenship of Intervenor.*

Another most important question, likewise apparently inadvertently neglected, is the want of diversity of citizenship between the intervenor and the defendants.

It is conceded that the intervenor Howell is a citizen of Montana. He resides at Billings, in that state. No attempt was made to show that at the time of filing his petition, or at any time since, he resided in Wyoming.

The decree of the Circuit Court, so far as it awards him any rights, can not stand. It is sought to justify it on the ground that the jurisdiction of the court being invoked by the respondent Morris, Howell had a right to intervene, and have his rights adjudicated, even though he should be a citizen of Montana. To this proposition we most respectfully dissent. It is conceded that when, by virtue of any action, property is brought before the Federal Court of Chancery, which is to be disposed of in the action, any person claiming an interest in the property may be made a party without regard to citizenship. Thus, in an action to foreclose a mortgage, judgment creditors or

holders of mechanics' liens may be admitted as parties, for the purpose of establishing their rights, without reference to their citizenship.

Lilienthal vs. McCormick, 117 Fed. 89.

So, in admiralty, which usually proceeds *in rem*, any one claiming a lien upon, or interest in the property in litigation may come in. It is plain from

Rouse vs. Lechter, 156 U. S. 47,

that to warrant an intervention without respect to the citizenship of the intervenor, the property that is the subject of the action must be *in custodia legis*. But there is no property before the court in this case. There can be none. The property which was made the subject of the bill of complaint—complainant Morris' water right—is not in Montana, but in Wyoming, beyond the jurisdiction of the court. The jurisdiction to proceed at all in this case can be maintained only on the theory that it is a purely personal action.

The Circuit Court for the District of Montana cannot adjudicate on water rights in the State of Wyoming.

Conant vs. Deep Creek Co., 66 Pac. 188.

But, finding within its jurisdiction one who threatens to do the complainant a wrong with reference to property beyond its jurisdiction, a court of equity will bring his person before it, and restrain him from doing that wrong. This case proceeds upon the theory of

Penn vs. Lord Baltimore, 1 Ves. 444, and
Massey vs. Watts, 6 Cranch. 148,

(see Notes to Penn vs. Lord Baltimore in II Lead. Cas. in Equity, 1817,)

namely, that it is a personal action.

His appearance here can confer no jurisdiction on the court over any controversy between him and these petitioners.

“The Circuit Court cannot take jurisdiction of an intervention in a merely personal action in which no fund has come into the possession of the Court by one who is a citizen of the same state as the party against whom his complaint is directed.”

Seligman vs. City of Santa Rosa, 81 Fed. 574.

In that case Judge Morrow referred to the case of

United Electric Co. vs. La. Electric Co., 68 Fed. 673,

in which one of the propositions determined is thus expressed in the syllabus:

“Where jurisdiction rests upon the diverse citizenship of complainant and defendant, and during the proceedings, a third party, who is a citizen of the state with defendant, intervenes, the court will have no jurisdiction of his controversy with defendant, unless the controversy between complainant and defendant is one which draws to the court the possession and control of defendant’s property, in which the intervenor claims some interest.”

Howell had no right to intervene in this action, and the order permitting him to do so was erroneous. And, the complainant having voluntarily assented to his intervening, the jurisdiction of the court was destroyed.

Forest Oil Co. vs. Crawford, 101 Fed. 849.

In that case, the plaintiff, claiming an undivided interest in certain lands, brought his action to quiet his title, alleg-

ing diverse citizenship. Afterwards other citizens of the same state with the defendant were permitted to intervene, and establish with plaintiff their joint claim against the defendant. The Circuit Court of Appeals for the Third Circuit held the jurisdiction failed, saying:

“We cannot shut our eyes to the quite apparent fact that he voluntarily assented to the irregular proceedings by which his bill, even if otherwise maintainable, was made fatally defective by the misjoinder therein of others as his co-plaintiffs. He seems to have been entirely satisfied to have the interposing parties united with himself, to assert with them a joint claim, and to recover with them a joint judgment; and he should not, we think, be now relieved from the consequences of his association.”

Forest Oil Co. vs. Crawford, 101 Fed. 852.

Although this is not a joint judgment, nor do the respondents prosecute a joint claim, still had they united in the first instance, as they might very properly have done, to assert jointly their several claims and to obtain a judgment requiring the petitioners to allow to flow down the stream the sum of 110 inches and 100 inches of water, there could be no doubt that the court would be powerless to proceed for want of jurisdiction, if that jurisdiction rests upon diversity of citizenship.

4. *The Amount in Controversy.*

The subject of the controversy, as was justly said by the learned judge before whom the suit was tried, is the complainant's water right. On the value of that right depends the jurisdiction of the United States Circuit Court. The bill avers it to be \$2,000, no more. It is, indeed, averred that the amount in controversy exceeds

\$2,000 exclusive of interest and costs, but in view of the direct averment that the complainant's water right is of the value of \$2,000, the general averment that the amount in controversy is greater than that sum must be deemed to be in the nature of a statement of a conclusion of law and valueless, or else as controlled by the later specific averments as to the value of the property involved.

It is true the bill avers that the complainant has been damaged in the sum of \$2500 by defendants' interferences with his water right, but damages in equity can be awarded only as incidental to the main relief. The jurisdiction to award damages is a *dependent* jurisdiction. If the court of equity has no jurisdiction over that feature of the controversy, by reason of which alone it is entitled to hear the cause, because the value of the litigated right is not sufficiently large, its jurisdiction cannot be helped out by the amount of damages claimed in consequence of an invasion of that right.

But more. The damages that might be awarded could not by any possibility exceed the value of the property right injured. One cannot recover damages for injury to property in excess of its value.

Lentz vs. Carnegie, 27 Am. St. Rep. 717.

If the complainant were, by proceedings in eminent domain, deprived for all time of his water right, his damages, conceding its value as averred in his bill, would be just \$2,000. It is apparent, then, that that is the amount in controversy. Accordingly, we insist that the bill shows on its face that the court has no jurisdiction and we sub-

mit that the evidence confirms the want of jurisdiction disclosed by the bill.

Undoubtedly in actions "sounding in damages" the amount claimed as damages controls. But this is not an action sounding in damages. It is an action in equity for an injunction, damages being asked as merely incidental relief. It is more nearly like an action to quiet title in which the value of the property is the test.

Simon vs. House, 46 Fed. 317;
Smith vs. Adams, 130 U. S. 167.

"In determining from the fact of a pleading whether the amount really in dispute is sufficient to confer jurisdiction upon a court of the United States, it is settled that if from the nature of the case as stated in the pleadings there could not legally be a judgment for an amount necessary to the jurisdiction, jurisdiction cannot attach even though the damages be laid in the declaration at a larger sum. *Barray v. Edmunds*, 116 U. S. 550, 560; *Wilson v. Danier*, 3 U. S. 3 Dall. 401, 407."

Vance vs. Vandercreek, 170 U. S. 468-472.

"Value Distinguished from Amount—Property Rights Involved.—Where property itself or its title is in litigation, or some question *per se* affecting its enjoyment and possession, its value is the real matter in controversy, as distinguished from the claims of the contending parties."

1 Ency Pl. & Pr. 726.

For want of showing by the bill of a dispute in which the amount exceeds \$2,000, the court never acquired jurisdiction.

The learned district judge in directing the decree to be entered, recognized that the averments of the bill would not support the jurisdiction of the court and ordered that

the complainant have leave to amend his bill to conform to the proof,

Transcript, page 640,

it being found that the complainant's water right is of the value of \$3,200.

Transcript, pages 168-175.

No application was ever made to amend nor was any order amending the bill or permitting it to be amended entered, nor was any amendment of the bill ever made. The decree in this case is affirmed, though it was entered upon a bill which the trial court recognized to be fatally defective for want of the essential jurisdictional averments.

The finding that the complainant's water right is of the value of \$3,200.00 was recognized by the trial judge to be valueless in the absence of averments in the bill upon which such a finding could be sustained. "The court can no more consider what is proved, but not alleged, than what is alleged but not proved."

The defect is all the more important as it is submitted that upon any fair consideration of the evidence adduced the complainant's right, whatever it may be, is but a small part of the amount awarded him, 100 inches, and upon the most liberal estimate of its value can not reach \$2,000. This ground of objection to the decree likewise received no mention in the opinion of the Circuit Court of Appeals.

Indeed, both jurisdictional objections—the want of diversity of citizenship between the intervenor, and the defendants, and the positive averment that the complainant's water right is of the value of but \$2,000, as well as

the point that the decree is inequitable as to Montana citizens because they were denied an opportunity to appropriate until they did so, by reason of the existence of the Crow Indian Reservation, were wholly ignored by the Circuit Court of Appeals, while a fourth question of great public moment was disposed of without any discussion whatever of the consideration upon which the petitioners founded the claim made by them.

The court even enumerates other questions discussed by counsel before it, but in no manner even adverts to the three important questions which this court is by this petition asked to consider. As to the fourth, no intimation is given even as to the grounds upon which the petitioners found their contention that the waters of the streams of Montana belong to its citizens and are subject to disposition only by its laws. The opinion simply declares that "the mere fact that the stream has its source in one state does not authorize a diversion of all the waters thereof, as against an earlier and prior appropriator across the line in another state." That is the proposition to be demonstrated. But there is no demonstration. The rule is declared, but no reasons whatever are advanced to sustain it. In its opinion the court says:

"4. Other questions argued by appellants, such as the alleged laches of the complainant, abandonment, adverse user by defendants, and insufficiency of the evidence to justify the decree as to the number of inches of water actually appropriated by the complainant and intervenor, do not require discussion."

It is most respectfully insisted that upon a careful consideration of the evidence, the contention of the appel-

lants in the Circuit Court of Appeals, the petitioners here, that the evidence would not justify the conclusion that the complainant ever appropriated more than 20 inches of the waters of Sage Creek, and that he lost that even by abandonment and adverse user by the petitioners, ought to be upheld. But as the learned judges of that court evidently had those contentions in mind in the framing of the opinion which they rendered, no appeal is made to this court for a review of the case because of error of the court in respect to those grounds. Upon the very important questions, however, herein specified and which were presented in the brief before that court and in the argument, and which were so feebly in the minds of the learned judges as not even to have received mention in a catalogue of the points urged, it is most respectfully insisted that a hearing in this court should be granted.

Respectfully submitted,

WALSH & NOLAN, and

GEORGE W. PIERSON,

Solicitors for Petitioners.

THOMAS J. WALSH,

Counsel for Petitioners.

122.

No. .

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1908.

J. N. BEAN, W. R. BAINBRIDGE, S. W. BENT,
WALLACE BENT and CORBETT BENNETT,
Petitioners,

vs.

W. A. MORRIS and T. N. Howell,
Respondents.

BRIEF OF RESPONDENT IN OPPOSITION TO THE
PETITION FOR A WRIT OF CERTIORARI.

N. W. McCONNELL and
O. W. McCONNELL,
Solicitors for Respondents.
N. W. McCONNELL,
Of Counsel for Respondents.

State Publishing Co., Stationers, Printers and Binders, Helena, Mont.

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**BRIEF OF RESPONDENTS IN OPPOSITION TO THE
PETITION FOR A WRIT OF CERTIORARI.**

The facts of this case are substantially as stated in the petition for the writ of certiorari, with the exception of the statement contained in page 5 of the petition, that T. N. Howell was allowed to intervene over the objection of the petitioners. This is not correct, for consent was expressly given for the said T. N. Howell to intervene in this case by each and all of the petitioners as well as the other parties to the suit, as appears from pages 68 and 69 of the Transcript in this case. It is also not one of the findings of the court, as stated on page 6 of the petition, "that the appropriations of the intervenor and that of the complainant were made at a time when all of the

territory drained by Sage Creek and its tributaries was a part of the Crow Indian Reservation, the south line of which conformed to the south line of the State of Montana." The court made no such finding as this. The facts of the case are briefly summarized in the ^{decision} ~~brief~~ of the Judge who delivered the opinion of the Circuit Court for the District of Montana, and is found in the case of Morris vs. Bean, 146 Fed., page 425, and also in the decision of the Circuit Court of Appeals in the case of Bean vs. Morris, 159 Fed., page 652.

We do not agree with counsel that the matters involved in this action are of such paramount importance as to invoke the extraordinary writ of certiorari in this court to the Circuit Court of Appeals of the Ninth Circuit. From the statement of facts this court will observe that this is an action to enjoin certain parties from interfering with the prior rights of the complainant to a small stream flowing from the State of Montana into the State of Wyoming. The issues in this case were so fully gone into in the decision of the Judge of the Circuit Court for the District of Montana, and again by the Circuit Court of Appeals for the Ninth Circuit, thoroughly and fully adjudicating all of the rights between the parties, and in keeping and consonant with the decisions, both Federal and State, that this case does not merit a review by this court.

Taking up the propositions which petitioners seek to have this court review in the order in which they are discussed by counsel for petitioners, we have

I.

THE RIGHT OF PRIOR WYOMING APPROPRIATORS AS AGAINST JUNIOR MONTANA APPROPRIATORS IN THE WATERS OF AN INTERSTATE STREAM.

The contention of petitioners is that the waters of Sage Creek, situated in Montana, under the constitution and the laws of Montana, belong to the people of the State, in their collective capacity, subject to be used by individual citizens of the State when appropriated under the laws of the State, and that a citizen of Wyoming cannot appropriate and acquire a right to the use of waters in such creek as against the citizens of the State of Montana, although this same stream flows from the State of Montana across the State line into the State of Wyoming.

Water, while regarded as real estate so long as it flows in its natural channel, is not like real estate in that it is fixed to one locality. It flows continuously, and in doing so, disregards state lines, and passes from one state into another. The right to the use of water is property. There is no distinct and separate ownership of corpus in the water itself, but the right to the use of it acquired by priority of appropriation is property, and is subject to the usual incidents of property, and will be protected as such. A water right is property within the constitutional provision that private property shall not be taken or damaged for a public or private use without just compensation. A person who has acquired a right to the use of water for

irrigation by appropriation can be deprived thereof only by his voluntary act, by forfeiture or by process of law.

While the legislature of a state has the right to regulate the use of water among the various appropriators from a common stream, it has no power to deprive an appropriator of his right, or any material part thereof under the guise of regulating the use of water. The Legislature of a State has not the arbitrary power by its mere fiat of changing the ownership of property. It can no more accomplish such a result than it could by legislative declaration change the laws of nature and prevent an interstate stream from flowing down hill. The broad principle which underlies the relative rights of appropriation from the same stream is that whoever is first in time is first in right, and this is so, regardless of the fact that a portion of the appropriators of said stream are citizens of one state and other appropriators are citizens of another state. This was the custom established in the early communities in the arid regions of the West, before there was ever any legislation upon the subject, either state or national. It is the principle of common sense; it is the principle of justice and equity. Montana recognizes the right to water by appropriation, and its statutes provide that he who is first in time is first in right. Every inch of all the waters in all the streams in the State of Montana are subject to this acknowledged doctrine of appropriation. Under the laws of the State of Wyoming the respondents had the right to and did make an appropriation of the waters of Sage Creek in the State of Wyoming. When they made their

appropriations out of Sage Creek there was not a single appropriator who took water out of the creek in the State of Montana. The right to the use of water flowing in Sage Creek was acquired by the respondents absolutely. This right was property, guaranteed, not only by the laws of Wyoming, but by the constitution and the laws of the United States. Consequently the petitioners, confronted with the fact that the waters of Sage Creek had already been appropriated by the respondents, made their appropriation from identically the same stream. Must it be that the property rights acquired in this water under the law by the respondents, shall be destroyed in order that the petitioners might acquire a property right in the same waters? Must it be that the universal rule governing the law of appropriation of water from a running stream that the first in time is first in right shall be set aside and destroyed? We insist that when the State, and through it the people of the State, acquire the right to a portion of an interstate stream, they take that right subject to the existing rights of appropriators in the adjoining State, acquired under the laws of said State to the waters of such interstate stream. It cannot be said that they have the unquestioned title to the whole of this water. So far as the decrees of courts have been granted affecting the rights of appropriators in interstate streams, they have wholly disregarded state lines and have recognized the right of appropriators of waters in interstate streams in the order of their priority of appropriation.

Four times has this matter been passed on involving the

waters of this same stream and between the same parties:
First in the case of

Howell vs. Johnson, 89 Fed. 556.

In this case it was held that,

“One who has acquired a right to the use of a stream flowing through the public lands by prior appropriation in accordance with the laws of the State is protected in such right by the Revised Statutes, Sections 2339-2340, as against subsequent appropriators, though the latter withdraw the water within the limits of a different State.”

The case at bar was before the court again and reported in

Morris vs. Bean, 123 Fed. 618.

in which the same doctrine is reiterated.

We call the court's particular attention to the able, learned and lucid opinion of Judge Edward Whitson, who decided this case in the Circuit Court for the District of Montana. His opinion is to be found in the case of

Morris vs. Bean, 146 Fed. 423.

In this opinion the court takes up and discusses and decides adversely to the petitioners all of the propositions now sought to be raised by the writ of certiorari, citing ample and abundant authorities in support of his contention.

We also refer to the case of

Bean vs. Morris, 159 Fed. 651,

which contains the opinion of the Circuit Court of Appeals, Ninth Circuit, in which it is seen that the court decides

the question of interstate streams and the question of Indian lands, two of the propositions urged by counsel for petitioners, adversely to the petitioners, giving authority and reason therefor. And as to the other two propositions raised by counsel for petitioners, namely, the citizenship of the intervener and the amount in dispute, the court states that they find no error in the record, and from the subsequent discussion of these propositions in this brief it will be seen that it was not incumbent upon the court to notice them.

We call the court's attention to the following decisions bearing directly upon the right of a citizen of one state to appropriate and take the water of an interstate stream, regardless of the appropriation of a citizen of an adjoining State:

- Rickey Land and Cattle Company vs. Miller and Lux, 152 Fed. 11.
- Anderson vs. Bassman, 140 Fed. 14.
- Willey vs. Decker, 73 Pac. 210.
- Conant vs. Deep Creek Company, 66 Pac. 188.
- Pine vs. Mayor of New York, 112 Fed. 98.
- Holyoke Water Co. vs. Connecticut River Co., 20 Fed. 71.
- Rutz vs. City of St. Louis, 7 Fed. 438.
- Opinion of the Attorney General, 4th Am. Law Register, 385.
- New Hampshire vs. Louisiana, 108 U. S. 76, 90.
- Perkins County vs. Graff, 114 Fed. 441.

For the rulings and holdings of the above courts particularly applicable in the decisions cited, we respectfully refer the court to our brief in the Circuit Court of Appeals, Ninth Circuit, which is herewith presented.

All through the opinion of the Supreme Court of the United States in the case of

Kansas vs. Colorado, 206 U. S. 46,

runs the doctrine that the legal rights of the parties must prevail, and recognizes the right of appropriation for beneficial irrigation. The illustration of the learned Judge who wrote the opinion, in which he supposes the controversy between two individuals to upper and lower riparian owners in a little stream reiterates the doctrine for which we contend that he who is first in time is first in right, when the court says:

“The question would be one of legal right, narrowed to place, amount of flow, and freedom from pollution.”

Idem, 27 Supreme Court Reps. p. 668.

And again the court says:

“As Kansas thus recognizes the right of appropriating the waters of a stream for the purposes of irrigation * * * she cannot complain if the same rule is administered between herself and a sister State. And this is especially true when the waters are, except for domestic purposes, practically useful only for purposes of irrigation.”

Idem. 27 Sup. Ct. Reps. p. 670.

The above citation of authorities involves contests over interstate streams between Nevada and California, Wyoming and Montana, Wyoming and Colorado, Idaho and Utah, Connecticut and New York, Massachusetts and Connecticut, Illinois and Missouri, Pennsylvania and New York, Nebraska and California. All of these cases have universally sustained the right of a prior appropriator in one state

against the junior appropriator in another state to the waters of an interstate stream. The learned counsel for the petitioners have been unable to cite a single authority in support of their position. We have been unable to find any that would sustain their contention. We cannot believe that this court will interfere with the decision of the Circuit Court of Appeals and thereby overturn prevailing and existing rights, but will rather follow the doctrine in force in all of the states that he who is first in time is first in right regardless of state lines.

II.

CROW INDIAN RESERVATION.

Counsel for *petitioners contend that*

“The Wyoming appropriators should have no priority because Montana citizens were denied an opportunity to appropriate in their state because of the existence of the Crow Indian Reservation.”

Counsel further state in their brief, page 19:

“It would appear that the Circuit Court of Appeals overlooked this feature of the case, as the opinion makes no mention of it, though purporting to enumerate the various questions presented by the appellants.”

We cannot agree with counsel for petitioners that the Circuit Court of Appeals overlooked this question, for we find an express adjudication upon this matter at the bottom of page 653, in the opinion of the court in the case of *Bean vs. Morris*, 159 Fed., from which we quote:

“2. It is also urged that complainant's appropri-

tion was invalid, because at the date of the initiation of his claim the head waters of Sage Creek were within the limits of the Crow Reservation in the State of Montana; that the complainant's appropriation conferred no right upon him as against the Indians of that reservation; and that appellants have succeeded to all rights of such Indians by their settlement upon the lands then occupied by such Indians. We think a complete answer to this contention is found in the opinion of the learned Judge presiding in the Circuit Court, in which he said:

‘When the right of the Indians was extinguished, and the land was thrown open to settlement, it became public, and, assenting for the sake of argument to the theory of the defendants, all that was in the way of the validity of the prior appropriations had been removed, and the appropriators in Wyoming were in point of time ahead of any claim which the defendants could possibly make, because their appropriations attached eo instante * * * The rights of the defendants attached as settlers after the lands were made subject to settlement. They cannot antedate settlement made by them. At that time prior appropriations had been made by the complainant and intervenor, and defendants took their riparian rights subject to and charged with those appropriations.’”

The Crow Indians had no riparian rights. The Indians living upon the reservation were wards of the United States Government and did not own the lands upon which they were living. Their right to the lands of the Crow Reservation was only that of occupancy, the *fee* to the land always remaining in the United States.

Beecher vs. Weatherby, 95 U. S. 525.

• Johnson vs. McIntosh, 8 Wheat. 543.

United States vs. Cook, 19 Wall. 591.

Clark vs. Smith, 13 Pet. 195.

Mr. Justice Field said in the case of Beecher vs. Weatherby, *supra*, p. 525, that

"The propriety or justice of their action toward the Indians were in respect to their lands not a question of Governmental policy and is not a matter open to discussion in a controversy between third parties, neither of whom derive their title from the Indians."

When the Indians ceded these lands on the Crow Reservation, now occupied by appellants, to the United States, the right of occupancy of the Indians, the only right they held, was extinguished and ceased to exist. The land then became open, public domain; "possession, when abandoned by the Indians, attaches itself to the fee without further grant."

Johnson vs. McIntosh, *supra*.

No riparian rights, if any, of the Indians then attached, it was the same as if the Indians had never occupied the lands. All that was in the way of the validity of the prior appropriators in the waters of streams rising on the reservation, if there was anything, was removed, and the rights of all those who had appropriated from such streams attached *eo instante*.

III.

CITIZENSHIP OF INTERVENER HOWELL.

Counsel for petitioners allege this as another most important point which, they say, was apparently inadvertently neglected by the Circuit Court of Appeals, and state that it is conceded that the intervener Howell is a citizen of Montana, and that no attempt was made to show that at the time of filing his petition, or at any time since he resided in Wyoming. In this counsel is also in error, as they

are when they state in their petition that T. N. Howell was permitted to intervene over the objections of petitioners, when the record shows that a copy of the petition in intervention was acknowledged "and consent given to said intervention in this cause." (Tr. p. 68). This is ^{signed} ~~cited~~ by George W. Pierson as solicitor for J. N. Bean, W. R. Bainbridge, S. W. Bent, Wallace Bent and Corbett Bennett, the very parties for whom the same counsel now appear as petitioners.

T. N. Howell swears in his petition in intervention that he is now, and for twelve years past, has been a citizen of the United States and of the Territory, now State, of Wyoming. We find in the testimony from the receipt issued by the Receiver of the United States Land Office at Lander, Wyoming, that Thomas N. Howell was at that time a resident of Bighorn County, State of Wyoming (Tr. p. 308). The sworn statement of the claim to water gives the post office address of Howell as Lovell, Wyoming (Tr. p. 306). So that it is not conceded that Howell is a citizen of Montana, and proof was introduced to show that at the time of the filing of his petition, and since, he was a citizen of Wyoming.

However, it is immaterial in this case whether he is a citizen of Montana or of Wyoming. The court below having once acquired jurisdiction by reason of diverse citizenship of the complainant Morris and of the defendants, it was not error to permit Howell to intervene to protect his rights regardless of his citizenship.

Conwell vs. White Water Valley Canal Co., Federal Cases No. 3148.

Osborn & Co. vs. Barge, 30 Fed. 805.

Belmont Nail Company vs. Columbia Iron and Steel Co., 46 Fed. 336.

IV.

AMOUNT IN CONTROVERSY.

It was alleged in the bill of complaint that the amount involved in this action exceeded the sum of \$2,000.00 exclusive of interest and costs. The Act of Congress of March 3, 1891, conferred jurisdiction upon Circuit Courts of the United States in suits in which there is a controversy between citizens of different States in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000.00. In this action there is a controversy between citizens of Wyoming on the one side and citizens of Montana on the other side, and the water, or thing in dispute, is the waters of the Wyoming appropriators. The jurisdiction, then, rests upon the value of the water right of the complainant Morris, who, as a citizen of Wyoming, instituted the action. The petitioners, as defendants in the court below, deny in their answer that the amount in dispute exceeds the sum of \$2,000.00. There was a straight issue, then, of fact as to whether the water right, the thing in dispute, did exceed the sum or value of \$2,000.00. If it did, the Circuit Court had jurisdiction. Some eight witnesses testified as to the value of the water rights of Morris and Howell respectively. From their testimony it appears that the value of the Morris water right is from \$3,200.00

to \$4,800.00, and the value of the Howell water right is from \$4,000.00 to \$6,000.00. The court below found the value of the water right of Morris to be \$3,200.00 and the value of the water right of Howell to be of like amount. The learned lower court was therefore correct in finding that the amount in controversy in this suit exceeded \$2,000.00 and the amount involved was ample to sustain the jurisdiction of the court.

Rayney vs. Herbert, 55 Fed. 443.

Miss. & Mo. R. Co. vs. Wood, 67 U. S. 485.

Stinson vs. Dousman, 20 How. 461.

The question as to the jurisdiction of the court upon the amount involved, and as to the citizenship of the intervener Howell, being simple and plain, and so clearly and overwhelmingly in favor of the respondents, there was no need for the Circuit Court of Appeals to take the matters up and discuss them in its opinion, and they are sufficiently answered when the court says that other questions argued by the appellants do not require discussion. It is sufficient to say we find no error in the record.

We respectfully submit that the law clearly upholds and sustains the contention of respondents and that the decree of the Circuit Court of Appeals should not be reviewed, but should be allowed to stand.

Respectfully submitted,

N. W. McCONNELL and

O. W. McCONNELL,

Solicitors for Respondents.

N. W. McCONNELL,

Of Counsel for Respondents.



IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT.

W. A. MORRIS,

Complainant and Appellee,

vs.

J. N. BEAN, W. R. BAINBRIDGE, BERT BENT,
WALLACE BENT, CORBETT BENNETT, (Appel-
lants), JOHN SEDRING, L. O. DILES, ALLEN P.
GRAHAM, WILLIAM ELEY, CURTIN BEELER,
CHARLES INGRAM, O. BUNYAN, WILLIAM
SHOLTZ, C. E. STEELE, JOHN RHODES, F.
BANDEROF, O. S. ERICKSON, TILMAN C.
GRAHAM, JAMES PAULEY, C. M. BROWN, JOHN
BOWLER, J. A. KING, A. HOLM, C. H. YOUNG,
and MICHAEL WROTE, (Appellees).

Defendants.

T. N. HOWELL,

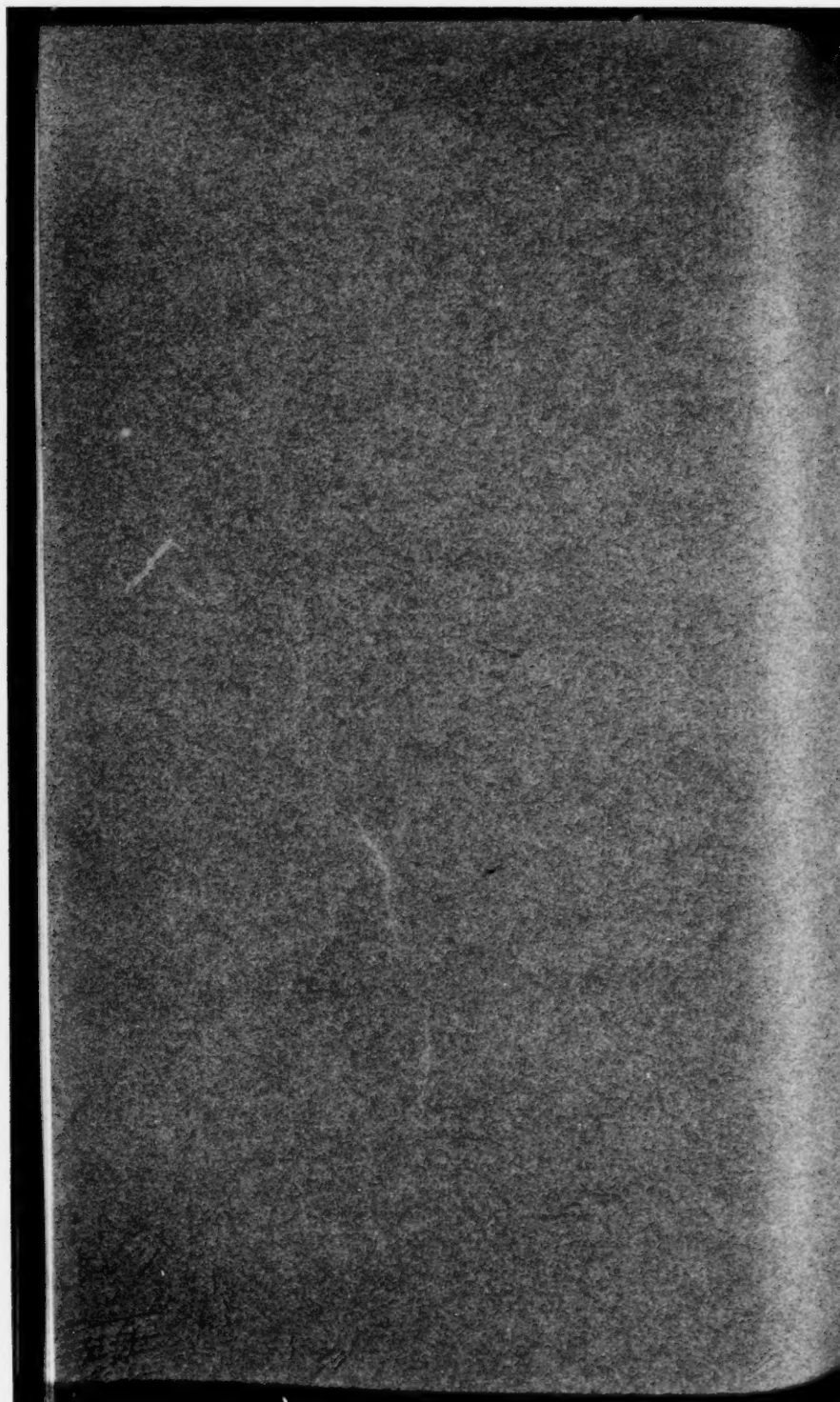
Intervenor and Appellee.

—
BRIEF OF APPELLANTS
—

GEORGE W. PIERSON and
WALSH & NOLAN,

Solicitors for Appellants.

T. J. WALSH,
Of Counsel.



IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT.

W. A. MORRIS,

Complainant and Appellee,
vs.

J. N. BEAN, W. R. BAINBRIDGE, BERT BENT,
WALLACE BENT, CORBETT BENNETT, (Appel-
lants), JOHN SADRING, L. O. DILTS, ALLEN P.
GRAHAM, WILLIAM ELEY, CURTIN BEELER,
CHARLES INGRAM, C. RUNYAN, WILLIAM
SHOLTZ, C. E. STEELE, JOHN RHODES, F.
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GRAHAM, JAMES PAULEY, C. M. BROWN, JOHN
BOWLER, J. A. KING, A. HOLM, C. H. YOUNG,
and MICHAEL WROTE, (Appellees),

Defendants.

T. N. HOWELL,

Intervenor and Appellee.

BRIEF OF APPELLANTS.

I.

STATEMENT OF FACTS.

This is an appeal from a final decree in equity entered
in the Circuit Court of the United States, for the District
of Montana. Suit was begun by the complainant alleg-

ing himself to be a citizen of Wyoming, and having therein acquired a water right of 250 inches, miner's measurement, in the year 1887, by diverting on to lands then occupied and now owned by him in that state, the waters of Sage Creek, such diversion having been made in the state of Wyoming, though the said Sage Creek has its source in the county of Carbon, state of Montana, through which it flows across the state line into Wyoming. He averred that the defendants, citizens of the state of Montana, had in irrigating seasons of three years prior to the commencement of this suit (January 20, 1903), in the state of Montana, diverted the waters of said Sage Creek at points on the stream above his point of diversion, and had also diverted the waters of Piney Creek, a tributary of said creek, emptying into it above the head of his ditch, such diversion also taking place in the state of Montana, such acts resulting in damage to him in the sum of \$2500. He prayed for an injunction and for damages.

Transcript, pages 3 to 10.

The defendants Bean, Bainbridge, Bert Bent, Wallace Bent and Corbett Bennett, answered denying that the complainant made any appropriation antedating the month of November, 1895. They admitted the diversion as charged, but denied that complainant had suffered any damage.

They further severally averred appropriations by themselves of the waters of Sage Creek and Piney Creek, in the state of Montana, for the irrigation of lands owned or occupied by them in Montana, through ditches in Montana. The lands in each instance were alleged to be unsurveyed public lands, which would be subject to entry

under the homestead laws when surveyed. That each of the answering defendants is a qualified homesteader, and that he intends to enter the lands occupied by him as soon as the same shall be surveyed. They averred that each, relying on his appropriation, cultivated his lands and improved them by the erection of houses, barns, etc., and that the lands are unproductive and valueless, unless they can be irrigated. They averred further the adverse use of the waters during the irrigation season for a period of more than ten years, and further said that by reason of the peculiar condition of the bed of Sage Creek and its tributaries the water sinks in places and rises in others, and that in consequence, notwithstanding any acts of the defendants, the complainant has had as much water during the period of which he complains as he ever used.

They prayed that no injunction be issued, but that if any should be, the rights of the defendants be determined and that they be restrained in the order of their priority.

Transcript, pages 22 to 42.

The defendants Graham, Wrote, Eley and Young answered similarly.

Transcript, pages 43 to 56.

The other defendants defaulted.

Before answering, however, the appealing defendants filed a plea to the effect that there were across Sage Creek, in the county of Carbon, State of Montana, for the purpose of diverting its waters, dams maintained by A. W. Adams, Nellie Bowler, John Frost and the Burlington and Quincy Railroad, and that though the defendants should be restrained from diverting the water of

Sage Creek or its tributaries, none of the water flowing therein will reach the ditch of the complainant because it will all be taken from the stream by the parties last above named, who, it was asked, should be made parties to the action.

Transcript, pages 14 to 16.

The plea and prayer was overruled. After the answers referred to had been made, one T. N. Howell was permitted to intervene,

Transcript, page 57,
the complainant expressly consenting.

Transcript, page 69.

This order having been made, the solicitors for complainant became, as well, solicitors for the intervenor, and the case was prosecuted by the complainant and the intervenor jointly. Thus, the stipulations preceding the depositions, set forth in the transcript, are all signed by such solicitors, both for the complainant and for the intervenor, and an inspection of the testimony taken by oral examination shows that the direct and the cross-examination, on behalf of complainant and intervenor, was conducted by these same solicitors.

Transcript, page 181.

The averments of intervenor's petition were of the same general character as those made by the complainant in his bill, his appropriation being alleged to be 6 1-4 cubic feet per second. He averred a Wyoming appropriation for the irrigation of lands in Wyoming, and declared himself to be a citizen of that state. That his use of the water was adverse and under a claim of right of priority over the defendants, but subject to the right of the complainant to 6 1-4 cubic feet, which he admitted.

The intervenor further alleged that he had enjoyed the use of the water without disturbance by any one until about two years before the filing of his petition in intervention, when the defendants began to use water in Montana to such an extent that he has been unable to get any water. He prayed for a decree establishing his right, and for an injunction and damages against the defendants.

Transcript, pages 58 to 67.

Answers were made by the same answering defendants, identical in general character with their answers to the bill, and specifically putting in issue intervenor's allegation of his Wyoming citizenship, and averring, on information and belief, that he is a citizen of Montana.

Transcript, pages 76 to 100.

Issues were joined by the general replication and the cause referred to a master to take testimony. He reported that the complainant had not complied with the laws of the State of Wyoming in making his appropriation, and could take nothing; that the intervenor had a prior right to the waters of Sage Creek to the extent of 110 inches; that the jurisdiction of the court depended on the citizenship of the complainant, not the intervenor, whose citizenship was not found, and that he was entitled to a decree establishing his right to the waters of Sage creek to the extent of 110 inches.

Transcript, pages 124 to 134.

On the incoming of his report the court set aside his finding as to the failure of complainant to acquire a water right by reason of non-observance of the Wyoming law, upheld the conclusion that the intervenor's citizenship was immaterial, and directed a decree awarding 100

inches of the waters of Sage Creek to the complainant and 110 to the intervenor, enjoining defendants from diverting so much as that the amounts stated could not be obtained from Sage Creek by the complainant and the intervenor respectively, but denying damages.

Transcript, pages 630 to 657.

A decree was entered accordingly,

Transcript, pages 178 to 180,
from which an appeal was duly allowed.

Transcript, pages 673-674.

The court found, among other things, also, that Sage Creek has its source in the Pryor mountains, Carbon County, Montana, and flows in a general southerly direction through a portion of Carbon County to and across the dividing line between Montana and Wyoming into the last mentioned state, where it falls into the Stinking Water river,

Transcript, page 166,
and that the appropriation of the intervenor (and necessarily of the complainant) was made at a time when all of the territory drained by Sage Creek and its tributaries was a part of the Crow Reservation.

Transcript, page 439.
This, of course, means in Montana, since the south line of Montana was the south line of the Reservation.

Revision of Indian Treaties p. 327-328;

The court found further against the claim of adverse user, of estoppel, and of abandonment made by the defendants.

Transcript, pages 163 to 177.

EXTENT OF COMPLAINANT'S RIGHT.

The complainant testified to having taken out his ditch; that he kept on increasing his irrigated area until he had, "four or five years ago" (that is by the year 1900 or 1901) 100 acres of alfalfa and grain in cultivation; that his ditch covers 120 acres and that he irrigates 160 acres with it.

Transcript, pages 278 to 308.

Passing the contradictions of this statement the evidence is overwhelming that he has never irrigated, at any time, more than 25 acres. Although many witnesses were called he is not corroborated as to the extent of his irrigated area by any of them. Even the surveyor called by the plaintiff did not commit himself on this point, simply saying that complainant's land *could* be watered by his ditch with laterals constructed from it, and that he saw evidences of irrigation on the place,—the extent of which he significantly omits to say.

Transcript, pages 201, 211-212.

On the other hand, the witness Hine made an actual survey of the land under the ditch and found it to be 21 acres and 43 rods, with a small garden patch, in all estimated by him to contain 22 to 23 acres.

Transcript, pages 402-403.

There is nothing to show that any more of the land has ever been irrigated, except that the witness Godfrey testified that in 1889 complainant had 40 acres under cultivation, and that this increased, but he could not say how much.

Transcript, pages 316-317.

The witness Martin testified that he thought that the Morris ranch was irrigated in 1899, but he did not say

how much.

Transcript, page 386.

The witness Medhurst testified that only three acres were irrigated in 1885, before Morris came; that there was very little water from '83 to '85, and that the place could not be irrigated to any great extent, because very little water would reach the place.

Transcript, page 440.

The witness Bean says that 25 acres were under cultivation, and the witness Bennett, both of whom assisted Mr. Hine in making the survey of the Morris place, estimated the amount under cultivation as 20 to 25 acres, with the addition of a small garden. The rest of the 160 acres had not been cultivated, and were covered with grease wood, from a foot high to as high as a person's head; that there are sand dunes there, and it showed no sign of ever having been cultivated.

Transcript, pages 457-458.

The witness S. W. Bent stated that perhaps 60 acres might be irrigated, out of the 160, but that only 20 to 25 had actually been irrigated, and that the rest was covered with sage brush.

Transcript, page 477.

Wallace Bent also testified that that part of Morris' land lying west of the creek has never been cultivated, and is covered only with grease wood and sage brush.

Transcript, page 491.

EXTENT OF INTERVENOR'S RIGHT.

The same witness Hine testified that there were not more than 110 acres under the intervenor's ditch; that the remaining part of his 200 acres is hilly, and could not possibly be irrigated. It seems that the court

must have awarded the intervenor 110 inches on the strength of these statements.

Transcript, page 403.

Bean also corroborates these statements.

Transcript, page 441.

Corbett Bennett stated that the intervenor's land showed no signs of having ever been cultivated; the ditches looked as if they had never been used. He also states that only 110 acres could be covered by the ditch; that the rest lies on a gravel hill or ridge and could not be covered by the ditch.

Transcript, pages 458-460.

The witness S. W. Bent estimated that three forties could be irrigated, but that eighty acres could not, as they are too high to be reached with water.

Transcript, page 477.

LACHES, ABANDONMENT AND STATUTE OF LIMITATIONS.

The intervenor testifies that he cultivated his land in 1891 and 1892, and raised a splendid crop in 1893; that he put in a big crop in 1894, but that the defendants took the water in June, and the crop dried up. He put in another crop in 1895, but that dried up also, for the same reason, and he raised nothing. He met with the same experience in 1896. Subsequent to that time he never put in any crop. He says, "I had lost three crops, and I got disgusted with it; it was no use to try it, until I got the water right."

Transcript, pages 283-287.

His complaint in intervention was filed September 5, 1903.

Transcript, page 69.

He suffered for want of water even in 1893. On cross-examination he says, "They (the defendants) used water late in the fall of 1893; we run short of water then; I know that, in '93 I saw we were not going to have water enough to cut the oats and I cut it for hay; I would have had to irrigate it again to make oats and we didn't have the water to do it with."

Transcript, page 300.

The witness Godfrey, called by complainant and intervenor, testified that there has not been enough water at the place of either of those parties with which to irrigate since 1893.

Transcript, page 317.

Another witness called by the same parties, Mr. English, tells that he was at the Howell ranch in the fall of 1893 and that everything was dried up,—no water there,—there was a little at Morris's but not much.

Transcript, page 333.

The intervenor, Howell, called on behalf of the complainant, says the latter has not raised any crops for five or six years, because he has had no water, and that he has been unable to raise any grain since 1894 for want of water; that since 1895 the water begins to fail about June 1, and by July 1 he is out of water for irrigation, and by August even for stock.

Transcript, page 298.

The complainant himself says that he has been short of water by reason of its having been taken by defendants ever since 1894.

Transcript, page 267.

On behalf of the defendants, the witness Hine tells that the head-gate of the Howell ditch is covered up with dirt

in the creek bank, filled to the top. He says "I observed Mr. Howell's land as to showing evidence of cultivation; it showed nothing more than just where the laterals—the laterals are ploughed out, and outside of that there is no evidence of any cultivation being there. The laterals do not show evidence of carrying water at any time. They seem to be just the same as when they were made; the appearance of the land is similar to that above the place, the same as outside of the fence. There isn't any of it that has got any grass on it, or anything to show that anything has been raised on it."

Transcript, page 404.

It doesn't show that it has ever been irrigated; there is no grass or anything to show it has been irrigated.

Transcript, page 416.

The defendant Bean says of the place, "I visited Mr. Howell's place, he has something like 100 acres under ditch; I couldn't tell that it had ever been cultivated. I didn't see anything to indicate that a crop had ever been sown on it only there was some furrows ploughed through but it didn't show that there had been any water in them, or had been any crop there; these furrows were some laterals ploughed through the field."

Transcript, page 442.

The defendant Corbett Bennett says "I went to Mr. Howell's place at this time. His head gate was made of two inch stuff completely covered over, and the opening next to the creek was two feet long by five and one-half inches deep. The opening on the ditch side was filled up with rubbish and stuff that had drifted in there and filled it in. We passed over Howell's land; so far as looking at the ground now is concerned, it shows no evidence

of ever having been cultivated, he had ditches leading on the land, they showed they had never been used since they were built. Howell had no dam at all in Sage Creek, two posts set on each side of the creek, and some boards put across, evident to back up the water, but they were gone, there had at one time been in, I should judge, a temporary dam."

Transcript, pages 459-460.

ESTOPPEL.

In connection with the foregoing facts should be considered the undisputed testimony that the lands of all the parties are unproductive, and well night valueless without irrigation; that each of the appealing defendants has taken out ditches from either Sage Creek or Piney Creek, and completed their appropriations according to the laws of the State of Montana, that of Bean dating from July 1, 1893,

Transcript, page 523,

Bainbridge's from August, 1900,

Transcript, pages 504-508, 510, 513, 503,

Bert Bent and Wallace Bent from some time in the month of October, 1892, after the 20th.

Transcript, pages 356, 184, 534, 538-540, 549-556,

and Corbett Bennett from July 3, 1893,

Transcript pages 543-552, 528; 227-233;

that Bean irrigates 60 acres of alfalfa, timothy, grain, potatoes, garden and orchard on his place, the orchard consisting of five acres of apples, pear and plum trees.

Transcript, pages 517, 527;

and that he has on the place other improvements consisting of ditches, fences, corrals, barns and houses of

the value of \$2000.

Transcript, page 517, 527,

that Bainbridge cultivates 30 acres of alfalfa, grain and potatoes, and has improvements on his place, consisting of a house, barns and sheep and horse corrals worth \$1500,

Transcript, pages 514-515, 502;

that Bert Bent has 150 acres in crop mostly wild hay with some alfalfa and grain; that he has on his place improvements consisting of fence, corrals, sheep sheds, stables, etc., of the value of \$2500,

Transcript pages 536-537, 571-574;

that Wallace Bent has 110 acres in crop, timothy, alfalfa, wild grass, grain and potatoes; that he has on his place improvements similar to his brother's worth \$2000,

Transcript, page 535, 536, 556,

and that Corbett Bennett irrigates 30 acres of timothy and alfalfa and has similar improvements on his place worth \$2000.

Transcript, page 530.

SINKING OF WATER IN SAGE CREEK.

A large amount of testimony was submitted on the one side to establish, and the other to refute the contention that in the season of low water the amount of the flow of Sage Creek is so small as that if allowed to run it would sink in the sands and be unavailable to the complainant or intervenor at their respective places

It appears by the uncontradicted evidence that Sage Creek is a slow stream, very crooked, the bed of which consists of sand or gravel, and that it is about forty miles, following its sinuous course, from the vicinity of the lands of the appellants to those of complainant.

Transcript, page 406, 455,
and twelve miles more to Howell's.

Transcript, page 438.

Robert Godfrey, who was called on behalf of complainant, testified that even in the year 1892 (it will be remembered that the reservation was not opened until October of that year and that none of the defendants diverted any water until after that time) there were simply puddles of water in the creek at complainant's place, and that the creek was dry at that of the intervenor by July 1st.

Transcript, page 324.

Michael Wrote, though one of the defendants, called by complainant, testified that the water sinks in the bed of Sage Creek in various places, and particularly at a place about two miles below the mouth of Piney Creek. This witness showed long acquaintance and familiarity with Sage Creek. He saw it every year and every month in the year since 1892. He had noticed it before that time at least in the seasons of 1887 and 1890. He found the same condition to prevail at the Morris place in 1887, water standing in holes. He camped on the creek with a cow outfit in 1890 and was obliged to search a place above Morris's because there was not water enough in Sage Creek to water the saddle horses or even to cook with except such as stood in the holes. Even then there was more than there was in 1887.

Transcript, pages 350-352.

Wallace Bent, one of the defendants, also called by complainant, testified to having lived on the creek since 1893. He said that he had seen all the water in the stream turned out and running down its channel and that he

never knew it to reach the Morris place.

Transcript, pages 362-363.

Albert H. Martin, a witness who is not a party and who appears to be entirely disinterested, tells that he worked as a cowboy in the vicinity of Sage Creek from 1887 to 1893; he details an experience he had in the year 1889; he was gathering beeves and crossed Sage Creek with them some time in August or September of that year; they crossed with the wagon right at the Morris place, but there wasn't water enough there with which to water the cattle and they drove them up to about the mouth of Piney, where the cattle crossed; there was scarcely any water at all where the wagon crossed, and it was very scarce from there on up to the mouth of Piney, where there was considerable.

Transcript, page 384-387.

Frank Medhurst testified that he lived on the Morris place from the spring of '84 to July, '85. When he left, July 6, 1885, he was able to get 10 or 15 inches of water out of the creek, not more than enough to irrigate a few acres. That was not yet the season of the lowest water and water was still scarcer in the creek the preceding year. He had seen the creek also in 1883, when the flow was no greater. He tells that the bed of the creek above the Morris place is gravel and quicksand, and that in those places the water sinks and does not rise again. He says further that the water begins to fall about June 20th, but before that time the flow suffices to irrigate 100 acres.

Transcript, page 392-399.

The appellant J. N. Bean testifies that at different times in the summer of 1903 all the water in the creek was allowed to flow down its bed; that it flowed about a

mile and a half below his place, and there disappeared, leaving the creek dry; that in the spring of the year when the freshets are on there is plenty of water for everybody, but that after June 20th or thereabouts, no water flows below the mouth of Piney, but that above a small quantity, possibly 40 inches, continues to flow. Between Bent's place and Morris's the bed of the creek is gravel, quicksand and rocks in which the water sinks. Pryor Mountain is the catchment basin supplying Sage Creek. It was formerly heavily wooded, but has been denuded in recent years in consequence of which the supply of water furnished by it goes away with a rush and becomes exhausted more early in the season than heretofore.

Transcript, page 433-436.

Corbett Bennett, another defendant, also testifies that in the fall of 1892, before any water was being taken out above, he saw the creek at the Morris place, where there was not water enough to permit irrigation. This witness testifies to having crossed Piney Creek many times before any of its waters were taken out for irrigation and says that in the dry season only a very little stream reached Sage Creek from it; that there was hardly more flowing in it than enough to water a horse; that below the mouth of Piney, Sage Creek is a very sluggish stream and that quicksands that imprison the waters abound.

Transcript, page 452-457.

S. W. Bent testifies that it is eighteen miles in a straight line from his place to Morris' and more than twice that distance following Sage Creek; that intervening it is boggy, marshy,—and that, as may be imagined from that fact, the stream is sluggish, flowing over quick-

sands in places; and that if all the water in Sage and Piney Creeks was allowed to flow down it would not reach the Morris place, the total amount in Sage Creek in the dry season not exceeding 300 inches.

Transcript, pages 475, 485.

Wallace Bent and William Bainbridge gave testimony to the same effect as the other appellants on the characteristics of the creek.

Transcript, pages 486-490, 492; 497-499.

In rebuttal of this testimony the witnesses Lampman, Sarver, Norton and James F. and Joseph M. Howell denied that there are any quicksands in Sage Creek or that the water sinks in it.

Transcript, pages 193, 204, 195, 206, 197, 208-209, 199, 210, 218-219.

In support of the complainant's right he offered in evidence a statement with endorsements as follows:

“Plaintiff's Exhibit ‘A.’

“In the District Court, Second Judicial District, in and for Johnson County, Wyoming Territory.

Statement of Claim to Water Right.

Under Chapter 61, Session Laws of 1886, Irrigation, “An act to Regulate the use of Water for Irrigation and for other purposes, and providing for Priority of Rights Thereto.”

By William A. Morris, of the County of Johnson.

Territory of Wyoming.

Owner of the Sage Creek Water Right.

Territory of Montana,

County of Yellowstone,—ss.

William A. Morris, being first duly sworn, according to law, do depose and say that he is a resident of and is

located in Johnson County, Wyoming Territory, and he makes his statement of claim to Water Right for the purpose of securing the right to the water of Sage Creek in the said County and Territory heretofore appropriated by him, and for said purpose I do depose and say: The name of said claimant for which said appropriation is claimed is William A. Morris. The name of the owner of said ditch is William A. Morris. The post office address of the owner of said ditch Billings, Montana. The head-gate of said ditch and water right is located on Sage Creek in Johnson County, Wyoming, about one mile down said creek from where said creek crosses the Wyoming and Montana line. The general course of said ditch is from about northeast to southeast. The name of the natural stream from which the said ditch draws its supply of water is Sage Creek, a tributary of Stinkwater River, Wyoming. The length of said ditch is three miles. The width of said ditch is (3 1-2) three and 1-2 feet. The depth of said ditch is two and 1-2 feet. The grade of said ditch is 50 feet per mile. The water of said stream was appropriated by William A. Morris, aforesaid, by means of a dam in said creek and ditch therefrom for said William A. Morris by the original construction thereof on the 5th day of May, A. D. 1887.

The amount of water claimed for said ditch is — cubic feet per second of time.

The present capacity of said ditch is — cubic feet per second of time.

The number of acres of land under said ditch and being and proposed to be irrigated therefrom is six hundred and forty acres, more or less.

W. A. Morris.

Subscribed and sworn to in my presence this 25th day
of June, A. D. 1887.

John McGinness,

(Notarial Seal.)

Notary Public.

(Endorsed): Wm. A. Morris. No. 2804. Office of
Register of Deeds. County of Johnson.

I hereby certify that the within instrument was filed
in this office for record on the 2 day of July, A. D. 1887,
at 5 o'clock P. M. and was duly recorded in Book "D,"
Misc. Rec., page 405. W. A. Evans, Register of Deeds.
....., Deputy. 28-04, Fees pd. 53. No. 666.
Morris. Plaintiff's Exhibit "A" to be attached to the
deposition of Wm. A. Morris. Filed Aug. 10, 1905. Geo.
W. Sproule, Clerk."

Transcript, pages 276 to 278.

No evidence of the filing was offered except the en-
dorsement on the statement.

To the introduction of this statement the answering de-
fendants objected on the ground that the same is imma-
terial and incompetent and does not comply with the
laws of either Wyoming or Montana.

Transcript, page 262.

The intervenor introduced as his notices of appropri-
ation two papers as follows:

"Plaintiff's Exhibit 'B.'

"Timber Culture Ditch.

Taken out of Sage Creek a tributary of Stinking Wa-
er River, on or near SW 1-4 of the SW 1-4 of Sec. 18, T.
57 N., R. 97 W., running thence 24 degrees E. of S. 88
rods, thence 30 degrees E. of S. 32 R. thence 9 degrees S.
of E. 22 R. 4 links, thence 42 degrees E. of S. 24 R. 10
links, thence 12 degrees E. of S., 8 R. thence 12 degrees
E. of S. 8 R., thence 12 degrees N. of W. 16 R., thence

45 degrees S. of W. 64 R., thence 25 degrees E. of S. 120 R., thence 31 1-2 degrees E. of S. 147 R. 4 links to the north line of Sec. 30, T. 57 N., R. 97 west. Water was first run through said ditch on August the 4th, 1891.

(Morris vs. Bean et al. Plaintiff's Exhibit 'B,' H. L. W.)”

“Plaintiff's Exhibit B-2.

The State of Wyoming,

Fremont County.—ss.

This certifies that Josiah Cook, Esq., was a duly elected and fully qualified justice of the peace in and for said county in said state, from the first Monday in January, 1891, to the first Monday in Jany., 1893, that all official acts done by him within said dates is entitled in full faith and credence.

In witness whereof, I have hereunto set my official signature, attested by my official seal, the seal of said county this Nov. 15th, 1893.

J. A. McAvoy.

County Clerk and the proper certifying officer under the laws of Wyoming to the official capacity of Notaries and Justices of the Peace.

(SEAL)

J. A. McAVOY,

County Clerk.

(Plaintiff's Exhibit B-2, H. L. W.)”

“Plaintiff's Exhibit B-3.

Statement of Claim to Water Right.

By T. N. Howell, Owner of the Timber Culture Ditch.
Territory of Wyoming.

County of Fremont,—ss.

I, T. N. Howell, being first duly sworn, do depose and say that I am the owner of the above-named ditch, situated in Water District No. 8, Fremont County, Wy-

oming Territory, and I make this statement for the purpose of securing the right to the water of Sage Creek heretofore appropriated by me and the right of way for said ditch on the line shown by the accompanying——

1.—The name of said ditch is Timber Culture.

2.—The name of the owner of said ditch is T. N. Howell.

3. The postoffice address of the owner of said ditch is Lovell, Wyoming.

4. The headgate of said ditch is located on the SW 1-4 of the SW 1-4 of Sec. 18, T. 57 N., R. 97 W.

5. The general course of said ditch is SE. and the line of said ditch is more particularly shown by the accompanying ——.

6. The name of the natural stream from which said ditch draws its supply of water is Sage Creek, a tributary of Stinking Water River.

7. The length of said ditch is one and one-half miles.

8. The width of said ditch is 8 feet at the top and six feet at the bottom.

9. The depth of said ditch is one foot.

10. The grade of said ditch is one-fourth inch to the rod.

11. The carrying capacity of said ditch is —— cubic feet per second of time.

12. Work was commenced on said ditch August 1st, 1890.

13. Water was appropriated from said ditch for NE. 1-4 of the SE. 1-4 and the SE. 1-4 of the NE. 1-4, and W. 1-2 of the NE. 1-4, S. 30, T. 57 N., R. 97 W.

14. The number of acres of land lying under and being and proposed to be irrigated by water therefrom is 160

acres.

T. N. HOWELL.

Sworn to and subscribed before me this 7th day of Sep., 1891.

JOSIAH COOK,

Justice of the Peace.

(Plaintiff's Exhibit "B-3." H. L. W.)

(Endorsed): Stat. Claim to W. Right by T. N. Howell, taking water from Sage Creek, a tributary of Stinking Water River.

State of Wyoming,

Fremont Co. Clerk's Office,—No. 5184.

Filed in this office for record at 10 o'clock A. M. Oct. 28, 1891, and recorded in Book A. of W. R. in the office of the State Engineer at pages 130 and 131, Miscellaneous Records.

J. A. McAVOY,

County Clerk and Reg. Deeds,

Recorded by State Engineer for Clk. Fremont Co. Wyo. Fees paid.

(Plaintiff's Exhibit "B" to Deposition of T. N. Howell.)"

Transcript, pages 303 to 307.

It seems to have been conceded below that neither the one nor the other of these statements met the requirements of the law of Wyoming at the time the appropriations of those parties respectively were made.

II.

SPECIFICATION OF ERRORS.

I.

It was error in the Court to find or rule that any ap-

appropriation made by the complainant or the intervenor of the waters of a stream in the State of Wyoming gave to them, or either of them, any priority over any right acquired by these appealing defendants or any of the defendants, under or by virtue of the laws of the State of Montana, or to the waters of any stream within the State of Montana.

II.

It was error in the Court to find or rule that any appropriation made by the complainant or the intervenor of any water within the State of Wyoming, or made under the laws of Wyoming, or any right to the use of the water of any stream in the said State of Wyoming, or acquired under the laws of Wyoming, or any right to the use of the water of any stream in the said State of Wyoming, or acquired under its laws, furnished any basis before any court sitting in the State of Montana for an injunction against these appealing defendants, having appropriated and acquired the right to the use of the waters being used by them within the State of Montana, under and by virtue of the laws of the State of Montana.

III.

It was error in the Court to find or rule that the Court had any jurisdiction to enforce, as against citizens of the State of Montana using waters within the State of Montana, of streams within the State of Montana, appropriated under its laws, rights claimed to have been acquired by the complainant and the intervenor to the use in the State of Wyoming of the waters of a stream within the State of Wyoming, acquired under and by virtue of the laws of the State of Wyoming.

IV.

It was error in the Court not to dismiss the petition of the intervenor, and it was error to grant him any relief, for that it appears that the Court has no jurisdiction of the subject matter of his petition or to grant him any relief, because he has not shown that he is or was at any time a citizen of any state other than the State of Montana, of which the defendants against whom he seeks and was granted relief are citizens.

V.

It was error to grant any relief to the complainant, for that the complainant consenting to the intervenor's joining with him in the prosecution of this suit against the defendants, the intervenor appearing to be a citizen of the same state with defendants, the Court lost jurisdiction and had no power to enter any decree except one of dismissal.

VI.

It was error in the Court to find or rule that any acts of the complainant or the intervenor in the State of Wyoming, while the lands now owned by these appealing defendants were a part of the Crow Indian Reservation, gave to the said complainant or the intervenor any priority of right to the waters of Sage Creek as against the rights of the Indians to the waters of the streams within the said reservation, or as against any person acquiring any of said lands through which any streams of the said reservation might flow, and particularly as against these appealing defendants acquiring lands within what was the said Crow Indian Reservation, at the time of the alleged appropriations of the said complainant and the said intervenor, on the opening of said reservation,

through which flowed the streams, from making use of the waters of which the decree entered herein enjoins these appealing defendants.

VII.

It was error in the Court to hold that any acts of the complainant or the intervenor, towards the appropriations of the waters of any stream in the State of Wyoming gave to them any rights as against occupants of lands within what was formerly the Crow Indian Reservation, as to streams flowing through the same, antedating the time when such lands ceased to be a part of said Crow Indian Reservation.

VIII.

It was error in the Court to find that the cause of action of either the complainant or the intervenor is not barred by the Statute of Limitations.

IX.

It was error in the Court to find that either the complainant or the intervenor is not guilty of such laches as to defeat his right to maintain this action.

X.

It was error in the Court to find that either the complainant or the intervenor is not estopped from maintaining this action.

XI.

It was error in the Court to find that either the complainant or the intervenor has not abandoned any right he ever acquired as against these appealing defendants to the waters of Sage Creek.

XII.

It was error in the Court to find or rule that the waters of said Creek, during the irrigating season do not sink

in the channel thereof, above the land of either the complainant or the intervenor, or that a useful quantity of the same would reach the lands of the intervenor or the complainant during the irrigating season, but for the diversion of the same and its tributaries by the defendant, and to fail to find and rule that the waters of said Creek, during the irrigating season, sink in its bed or channel, so that, though the defendants diverted none of the same or the waters of the tributaries of the said Sage Creek, a useful quantity thereof would not reach the lands of either the complainant or the intervenor.

XIII.

It was error in the Court to find that the complainant is entitled to, or to adjudge to him, more than twenty-five inches, miners' measurement, of water, or to find that the intervenor is entitled to, or to adjudge to him, more than forty inches, miner's measurement, of water.

XIV.

It was error in the court to award to either complainant or intervenor any number of inches, "miner's measurement," for that in his bill complainant alleges an appropriation of two hundred and fifty inches "statutory measurement" and intervenor six and one-fourth cubic feet per second, neither alleging an appropriation of any number of inches "miner's measurement."

XV.

- It was error in the Court to award to either the complainant or the intervenor any quantity of water measured by miner's inches, for that the standard for the measurement of water in the State of Wyoming is a cubic foot of water per second, and because a miner's inch is an uncertain and indeterminate quantity.

XVI.

It was error in the Court to hold that the complainant acquired a water right, notwithstanding he failed to comply with the laws of Wyoming in reference to filing of a statement of his appropriation, as required by the laws of that State.

XVII.

It was error in the Court to hold that the intervenor acquired a water right, notwithstanding he failed to comply with the laws of Wyoming by filing an application, and obtaining a permit, as required by Section 34 of the Act of the Legislative Assembly of the State of Wyoming, approved December 22nd, 1890.

XVIII.

It was error in the Court to hold it unnecessary for complainant or intervenor to make proof that their appropriations, respectively, were made either on the public domain or on private lands, with the consent of the owner of such lands.

XIX.

It was error in the court to hold that the amount in controversy exceeded \$2,000.00.

III.

ARGUMENT.

I.

A question of first importance in this case is as to whether the complainant or the intervenor has any water right that he can assert in any court in Montana, seeing that the only right he claims originates by reason of his diversion in the State of Wyoming of the waters of a stream coming into that state from the State of Mon

tana, within which state the defendants are making the diversions complained of from the same stream and its tributaries.

Complainant and intervenor claim to be citizens of Wyoming. Defendants against whom the decree appealed from is awarded are citizens of Montana.

It is with some diffidence that the discussion of this important question is entered into, in view of the fact that the conclusion arrived at by the learned trial judge that a water right acquired in one state by a citizen thereof, for use on lands in that state, may be enforced in another against citizens of that state, is supported by the conclusion of Judge Knowles in

Howell vs. Johnson, 89 Fed. 556;

and in Morris vs. Bean, 123 Fed. 618;

by that of Judge Hallett in

Hoge vs. Eaton, 135 Fed. 411;

by that of Judge Morrow in

Anderson vs. Bassman, 140 Fed. 14,

and by the reasoning (the question presented not being identical) of the Supreme Court of Wyoming, in

Willey vs. Decker, 73 Pac. 210.

We are to some extent, however, reassured by the fact that the course of reasoning of the learned federal judges, including Judge Whitson, on whose order the decree appealed from was entered, has been repudiated by the Supreme Court of Wyoming, and the theory of the nature and origin of the right of appropriation upon which the decisions of the federal courts referred to are founded, held by that learned court to be altogether erroneous.

It might be said in passing that the ruling of Judge

Knowles, reported under the title of *Howell vs. Johnson*, 89 Fed. 556, was made on a demurrer in that case, and his later ruling in *Morris vs. Bean*, 123 Fed. 618, on an application for a temporary injunction. His views were accepted by Judge Morrow in *Anderson vs. Bassman* and Judge Hallett hardly more than expresses his conviction as to the question involved in *Hoge vs. Eaton*. Though Judge Whitson gives us the benefit of some discussion of the subject in his opinion on which the decree is based,

Morris vs. Bean, 146 Fed. 423,

it is evident that the earlier rulings of Judge Knowles had a preponderating influence with him, as they, of right should have, not only because they, in a sense, declared the law of the case, but because of the just fame of that learned jurist in respect particularly to those branches of the law involved in the case.

But the Supreme Court of Wyoming having expressly repudiated the theory upon which Judge Knowles reached his conclusions, arrives at the same result by a course of reasoning not at all clear.

Some attention should first be given to these two conflicting theories of water rights.

In *Howell vs. Johnson*, Judge Knowles said:

“It is urged that in some way the state of Montana has some right in these waters in Sage Creek or some control over the same. It never purchased them. It never owned them. * * * In that case (*St. Anthony Falls Water-Power Co. v. Board of Water Com’rs of St. Paul*, 18 Sup. Ct. 157) it was not held, nor was it held in any of the cases cited in the decision therein, that the rights of the owner of the land

through which any navigable stream flowed, within the boundaries of any state, depended upon the laws of such state, or that the said owners' right to such waters depended upon such laws, as against one who claimed a right to the same under the laws of congress. To so hold would uphold the view that a state might interfere with the primary disposal of the land of the national government. When a party has obtained title to property from the national government, the state government has no right to destroy that title, except under the power of eminent domain. The state of Montana cannot step in, and say, 'The right to the water of Sage creek, which the plaintiff acquired under the laws of congress, you cannot exercise in this state.' "

Howell vs. Johnson, 89 Fed. 559.

The theory so advanced by the defendants was held to be groundless, at least as to non-navigable waters. Earlier in the opinion the learned judge had traced the foundation of water rights to congressional legislation, to a grant from the general government, not from the state government, his course of reasoning being shown by the following extract from the opinion.

"The national government is the proprietor and owner of all the land in Wyoming and Montana which it has not sold or granted to some one competent to take and hold the same. Being the owner of these lands, it has the power to sell or dispose of any estate therein or any part thereof. The water in an innavigable stream flowing over the public domain is a part thereof, and the national government can sell or grant the same, or the use thereof, sep-

arate from the rest of the estate, under such conditions as may seem to it proper.”

Howell vs. Johnson, 89 Fed. 558.

The idea is quite clearly expressed by Judge Morrow in *Anderson vs. Bassman*, wherein, after referring at length to the views of Judge Knowles in *Morris vs. Bean*, he says :

“It was further urged that, as the complainant had obtained his rights from the state of Wyoming by appropriating the water in accordance with its laws, his rights depended upon such laws, and were governed thereby. But the court very clearly explained that the rights of the complainant did not rest upon the laws of Wyoming, but upon the laws of Congress; that the legislative enactment of Wyoming was only a condition which brought the law of Congress into force.”

Anderson vs. Bassman, 140 Fed. 41.

Now the state of Wyoming denies that the right to the use of the waters of that state by appropriation rests upon any congressional grant; it denies that the waters of that state belonged to the general government except as trustee for the state, and it asserts that the state and the state alone is the fountain and source from which springs any right whatever to the use of the flowing streams within its borders.

Its views are elaborated in a number of decisions of its highest judicial tribunal and are enforced with a wealth of learning and cogency of reasoning that would command respect, even though the appellees were not citizens of that state, and required to look to it for such rights as they may have to the waters of Sage Creek.

The opinion in the case of

Farm Investment Co. vs. Carpenter, 61 Pac.
258,

sets forth most fully, perhaps, the theory of the Wyoming court. Therein reference is made to the following provisions of the constitution of that state:

“ ‘Water being essential to industrial prosperity, of limited amount, and easy of diversion from its natural channels, its control must be in the state, which, in providing for its use, shall equally guard all the various interests involved.’ Article 1, Sec. 31. ‘The waters of all natural streams, springs, lakes, or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state.’ Article 8, Sec. 1. ‘There shall be constituted a board of control to be composed of the state engineer, and superintendents of the water divisions; which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the state and of their appropriation, distribution and diversion, and of the various officers connected therewith. Its decisions to be subject to review by the courts of the state.’ Id. Sec. 2. ‘Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests.’ Id. Sec. 3. ‘The legislature shall by law divide the state into four (4) water divisions, and provide for the appointment of superintendents thereof.’ Id. Sec. 4. ‘There shall be a state engineer who shall be appointed by the governor of the state and confirmed by the senate; he shall hold

his office for the term of six (6) years, or until his successor shall have been appointed and shall have qualified. He shall be president of the board of control, and shall have general supervision of the waters of the state and of the officers connected with its distribution. No person shall be appointed to this position who has not such theoretical knowledge and such practical experience and skill as shall fit him for the position.' *Id.* Sec. 5."

The provision that "The waters of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state are hereby declared to be the property of the state" is held to be merely declaratory of an existing right, as of necessity it must be. If these waters did not belong to the state, but were owned by the general government or by private individuals the recital in the Wyoming constitution would be an evident attempt at confiscation.

The court, accordingly, defends this declaration in the following language:

"At the outset, however, it is strenuously insisted that the declaration contained in the constitution, that the waters of the natural streams, etc., are the property of the state, is meaningless and of no force and effect. It is argued that the state no more than an individual can acquire property by a mere assertion of ownership, and that the United States, as the primary owner of the soil, is also primarily possessed of title to the waters of the streams flowing across the public lands. This contention demands more than a passing notice. * * * Under the doctrine of prior appropriation, it would seem essential that

the property in waters affected by that doctrine should reside in the public, rather than constitute an incident to the ownership of the adjacent lands. Such waters are, we think, generally regarded as public in character. By the civil law the waters of all natural streams were *publici juris*, and, according to Bracton, that was the rule anciently in England. *Kin. Irr. Sec. 53*; *Gould, Waters, Sec. 6*. At the modern common law, public waters are generally confined to those which are navigable, and public rights therein to navigation and fishery, and privileges incident thereto. In the arid region of this country another public use has been recognized by custom and laws, and sanctioned by the courts,—a public use sufficient to support the exercise of the power of eminent domain. *Irrigation Dist. v. Bradley*, 164 U. S. 112, 160, 17 Sup. Ct. 56, 41 L. Ed. 369. This use and the doctrine supporting it are founded upon the necessities growing out of natural conditions, and are absolutely essential to the development of the material resources of the country. Any other rule would offer an effectual obstacle to the settlement and growth of this region, and render the lands incapable of continued successful cultivation. The waters for the reclamation of the desert lands must be obtained, in a very large measure, from the natural streams and other natural bodies of water. The common-law doctrine of riparian rights relating to the use of the water of natural streams and other natural bodies of water not prevailing, but the opposite thereof, and one inconsistent therewith, having been affirmed and asserted by custom, laws, and decisions of courts, and

the rule adopted permitting the acquisition of rights by appropriation, the waters affected thereby become, perforce, publici juris. It is therefore doubtful whether an express constitutional or statutory declaration is required in the first place to render them public. In a country where doctrine of prior appropriation has at all times been recognized and maintained, an expression by constitution or statute that the waters subject to appropriation are public, or the property of the public, would seem rather to declare and confirm a principle already existing, than to announce a new one. But, however, this may be, we entertain no doubt of the power of the people in their organic law, when existing vested rights are not unconstitutionally interfered with, to declare the waters of all natural streams and other natural bodies of water to be the property of the public or of the state. Nor do we doubt that the legislature may make a like declaration, when in that particular unrestrained by the constitution. If any consent of the general government was primarily requisite to the inception of the rule of prior appropriation, that consent is to be found in several enactments by congress, beginning with the act of July 26, 1866, and including the desert-land act of March 3, 1877."

It invites attention to a similar legislative declaration in Arizona and Nevada and to the fact that the people of Colorado made a similar assertion through their constitution in reference to which the supreme court of that state said in

Wheeler vs. Irrigation Co., 10 Col. 582, 17 Pac.
487:

“Our constitution dedicates all unappropriated water in the natural streams of the state to the use of the people, the ownership thereof being vested in the public. We shall presently see that after appropriation the title to this water, save, perhaps, as to the limited quantity that may be actually flowing in the consumer’s ditch or lateral remains in the general public, while the paramount right to its use, unless forfeited, continues in the appropriator.”

And in

Ft. Morgan L. & C. Co. vs. South Platte Co., 18
Col. 1, 30 Pac. 1032.

“Under our constitution, the water of every natural stream in this state is deemed to be the property of the public. Private ownership of water in the natural streams is not recognized. The right to divert water therefrom and apply the same to beneficial uses is, however, expressly guaranteed. By such diversion and use a priority of right to the use of the water may be acquired.”

Reference is then made to the well-known decisions of the Supreme Court of the United States holding that the tide waters and the waters of navigable streams are the property of the state, a proposition assented to by Judge Knowles in *Howell vs. Johnson*, and the conclusion is reached that in the arid states where water, in the language of the Wyoming constitution, is “essential to industrial prosperity”, the proprietorship of all waters is in “the state, as representative of the public or people.”

A similar declaration as to the state’s ownership of the waters within it is made in the constitution of North Dakota.

North Dakota Const., Art. 17, Sec. 210.

A most instructive consideration of this subject and the conflicting opinions of courts touching it will be found in

1 Farnham on Waters, 135 to 136a.

and in

2 Farnham on Waters, 649 to 652.

Results widely different and of great moment follow from the adoption of the one or the other theory of the origin of water rights,—whether they emanate from the state or exist by reason of a grant from the general government.

If the general government owns the waters on the public domain as an incident of its ownership of the public lands as asserted by Judge Knowles in *Howell vs. Johnson*, it may grant the right to the water separate and apart from the land. It is argued from the premise of its ownership of the waters that the acts of 1866 and 1890 operate to convey to an appropriator title to so much of the waters of a stream as he may appropriate, but that if the government has theretofore granted to any one land bordering on or traversed by the stream, it has already granted to such person as an incident to his grant of land riparian rights in the stream, to which the right of the subsequent appropriator is subject. If the grant of the riparian lands, by relation or otherwise, antedates the appropriation, the riparian right is paramount; if it is later, by the provisions of the acts of 1870 and 1866, it is subject to the accrued right to the water.

The views expressed by the learned judge in reference to the proprietorship of the general government in the waters on the public domain led him in

Cruse vs. McCauley, 96 Fed. 369,

to the conclusion that a pre-emptor whose declaratory statement was filed prior to an appropriation of the waters of a stream flowing through his pre-emption claim, could assert riparian rights as against the appropriator.

This is the doctrine of

Lux vs. Haggin, 69 Cal. 255; 10 Pac. 674.

in which the rule of the civil law, adverted to in Farm Investment Company vs. Carpenter, that the title to all waters is in the public, was held not to be in force in California.

See note 10 to

1 Farnham on Waters, 136.

Oregon followed the California rule in

Curtis vs. Water Co., 20 Or. 34.

It is likewise the law of Washington.

Benton vs. Johncox, 17 Wash. 277; 49 Pac. 495.

It is asserted in recent exhaustive discussions of the subject by the supreme court of Nebraska.

Meng vs. Coffey, 93 N. W. 713;

Crawford Co. vs. Hathaway, 93 N. W. 781.

It must be the law of North Dakota in view of the decision in

Bigelow vs. Draper, 69 N. W. 570.

It will be observed, however, that all the states from which these decisions come, those of Judge Knowles alone excepted, lie about the border of the arid region. To what extent the opinions of Judges Morrow and Whitson may have been influenced by the doctrine prevailing in their own states, it is, of course, impossible to know.

But when we get into the very heart of the arid region, we find the state courts uniformly refusing to give any

assent to the existence of any riparian right whatever. They deny that the grantee of *land* from the government acquired any right whatever in the water flowing through it. Colorado led in the denial to the riparian owner of any rights in the waters of the stream,

Coffin vs. Left Hand Ditch Co., 6 Col. 443,
and the rule announced by it became known as the "Colorado doctrine"

Long on Irrigation 6.
in distinction from the rule of

Lux vs. Haggin,
spoken of as the "California doctrine."

Willey vs. Decker, 73 Pac. 210-214.

Although Nevada originally enforced the riparian right, it no longer recognizes it.

Union M. & M. Co. vs. Cangberg, 81 Fed. 73-94.

Arizona enforced the civil law that waters were public and subject to disposition by the legislature under the law of appropriation, in

Clough vs. Wing, 17 Pac. 453.

The supreme court of Idaho spoke of the "phantom of riparian rights" and denied the existence of such a thing in that state.

Drake vs. Earhart, 23 Pac. 541.

Utah declines to recognize their existence.

Stowell vs. Johnson, 26 Pac. 290.

New Mexico adheres to the same view.

Albuquerque vs. Gutierrez, 61 Pac. 357.

And Montana gave its assent to these decisions in

Montgomery vs. Fitzpatrick, 20 Mont. 181-185,
in the opinion in which the court said:

"In all of the states of the union where mining has

been at all extensively engaged in, especially in the northwestern states and territories, the question here presented for determination has been a fruitful source of litigation. Under the common law the owner of land through or along which a stream flowed had a right to have it flow in its natural channel, undiminished substantially in quantity, and unpolluted in quality, whether he derived any practical benefit from such stream or not. This doctrine has been departed from, if indeed, it ever was recognized as the rule of law in the gold mining states and territories of the northwestern part of the union, and especially so in the Pacific states and territories. There the right to appropriate water for mining and other useful purposes is as old as the settlement and civilization of such states and territories. The right to appropriate water on the public lands by miners and for other useful purposes was long ago recognized by congress. We think it may be safely said that the right to appropriate water for mining and other useful purposes is settled as the law in all the mining states of the West. It is certainly the settled rule in this state. (*Atchison v. Peterson*, 1 Mont. 561; *Gallagher v. Basey*, 1 Mont. 457.) California, it is true, by a divided court has confined the right to make such appropriation to waters on public lands, holding that the purchaser of lands from the government takes the same with all the common-law riparian rights attached. (*Lux v. Haggin*, 49 Cal. 255. 10 Pac. 674.)

“The Oregon Supreme Court, in *Curtis v. Water Co.*, 20 Or. 34, 23 Pac. 808, and 25 Pac. 378, followed

the rule announced by the California court. But this restriction is not recognized in Nevada or Colorado, nor in any other of the mining states or territories, that we are aware of. (*Jones v. Adams*, 19 Nev. 78, 6 Pac. 442; *Reno Smelting, M. & R. Works v. Stevenson*, 20 Nev. 269, 21 Pac. 317; *Coffin v. Ditch Co.*, 6 Col. 443; *Golden Canal Co. v. Bright*, 8 Col. 144, 6 Pac. 142.)”

Some confusion in opinion as to the law of Montana on this subject has arisen by reason of some remarks made by Mr. Justice Pigott in

Smith vs. Denniff, 24 Mont. 20; 60 Pac. 398.

The supreme court of Wyoming appears to have gained the impression that by this decision the Montana court is committed to the “California doctrine.”

Willey vs. Decker, 73 Pac. 210.

And the author of

Long on Irrigation

is similarly in error.

It is clear from the context that the only idea the court intended to convey by the language to which has been attributed this significance is that one may not invade the possession of a riparian proprietor for the purpose of cutting therein a ditch to effect a diversion of the water of a stream, and thus initiate an appropriation without the consent of the riparian proprietor; that both the general government and the state government have given permission to cut ditches through their lands either to initiate the right or to convey the water to the lands to be irrigated, but that permission must be first had of a private riparian proprietor.

None of the district courts of the State of Montana

ever enforce the riparian right and Farnham says it does not exist in the law of that state.

3 Farnham on Waters, 652d.

The learned author last referred to invites attention to the fact that the court in the very case of *Smith vs. Denniff*, *supra*, declared that by reason of a provision of the constitution, the State of Montana "has, by necessary implication, assumed to itself the ownership *sub modo* of the rivers and streams of the state."

The views of the supreme court of Wyoming have been adverted to. With one accord the states of the arid region deny that the grantee of land from the government gets any right to the waters flowing through or along it, and assert that such waters belong to and remain in the state; that the state has the right to say and does say whether those waters shall be enjoyed by the riparian proprietors in accordance with the rule of the common law, or be enjoyed by those who may divert and appropriate them. They declare that the water rights do not originate in grant from the general government by virtue of the act of 1866, but that that act merely, as has been repeatedly declared by the Supreme Court of the United States, recognized pre-existing rights

Forbes vs. Gracey, 94 U. S. 762;

Jennison vs. Kirk, 98 U. S. 453;

Broder vs. Water Co., 101 U. S. 274.

If it be true that the rights existed before there was any legislation whatever on the subject by Congress, in what did they originate? Clearly in the local law. But neither a state nor any subdivision of the state has any power to dispose of the public lands. That power is vested, by the express provisions of the constitution, in Congress.

The deduction is inevitable that if these rights were in existence prior to the time that Congress acted at all, they must have been derived from some authority other than Congress.

The act of 1866 was simply a formal renunciation on the part of the United States of any claim it or its grantees might have to the continued flow in the stream of water that had been appropriated, assuming that it or they had any such. It was, as disclosed by its very terms, a statute of repose, not of grant. Nor can we imagine, as seems to be intimated in *Howell vs. Johnson*, that by this statute power was delegated to the local legislatures to enact laws looking to the disposition of the waters of the streams on the public domain. If such waters are indeed incidents of the lands or the right to use such waters incident to the lands over which they flow, such a delegation of power to legislate on a subject confided by the constitution exclusively to Congress would be void.)

A recent declaration by the Supreme Court of the United States leads clearly to the conclusion that the views so generally entertained as to the origin of water rights in grant from the government, expressed by the learned federal judges in the cases referred to, must be revised. Reference is made to the following from

U. S. vs. Rio Grande Irr. Co., 174 U. S. 690:

“As to every stream within its dominion, a state may change this common-law rule, and permit the appropriation of the flowing waters for such purposes as it deems wise.”

If a state can do this, it must be because it owns the waters and simply permits their use obedient to its laws.

If it may take away riparian rights as understood at the common law and give the use of the water to appropriators, it may, when that course seems to it wise, abolish the system of appropriation and invest riparian owners with such rights in the stream as they would enjoy at the common law. If we hold to the theory that the appropriator of water enjoys a grant from the general government, it would be simply confiscation to take it away from him and distribute it among riparian proprietors; and equally, if the riparian proprietor enjoys riparian rights in the stream as an incident of his grant of lands from the government, the legislature is powerless to take that property away from him.

Judge Hallett says in

Mohl vs. Lamar Canal Co., 128 Fed. 776-779, that an appropriator of water enjoys a mere license or privilege to take the water and "has no contract with or grant from the government, federal or state, in respect to his privilege."

Entertaining, as we have heretofore shown, the theory that the riparian right accrues, as against all subsequent appropriators, in favor of the riparian grantee of the government, it has been held in North Dakota that an act abolishing riparian rights is void as to accrued rights.

Bigelow vs. Draper, 69 N. W. 573.

As all lands in a state, save its own, are held either in private ownership or belong to the government, and the government as a proprietor enjoys exactly the same rights as any other owner, it follows that the state can not abolish the riparian right, according to the reasoning of these decisions, except as to its own lands. Of course, the Supreme Court of the United States contemplated

and expressed its view of the validity of legislation of a much more sweeping character.

Rights which one enjoys by reason of his ownership and interest in property, under the laws existing at the time of the acquisition of that interest, cannot (subject, of course, to the police power of the state) be taken away from him by subsequent repeal or amendment of the law, by virtue of which he enjoys such rights.

B. & B. Co. vs. M. O. P. Co., 25 Mont. 41.

It is respectfully urged, accordingly, that, in view of this late declaration of the Federal Supreme Court, and the views repeatedly expressed concerning the act of 1866, the theory advanced by the Supreme Courts of Colorado, Wyoming and Montana, and concurred in by the Courts of last resort in the other interior States in the arid region, that the waters within their borders belong to the public, to the state, is correct, and must ultimately be adopted.

It is said, in some of the decisions referred to, that the common law, as it defines the rights of riparian proprietors, is inapplicable to the conditions existing in regions where irrigation is necessary, and therefore that the riparian right does not exist. But if the riparian proprietor does not own the water or the right to use it, who does? There can be but one answer. It belongs to the public, to the state.

(That the state owns the navigable waters within its borders and the soil under them is not open to question.

Shively vs. Bowlby, 152 U. S. 1.

On acquiring new territory, the general government becomes invested with the title to such waters and lands, but holds them, not as it holds the general body of the

public domain, subject to disposition for the benefit of the general treasury, but in trust for the people of the state or states, which may ultimately be formed out of the new territory, which state or states, on being admitted, have the absolute right of disposition of such lands and waters,

Id. pages 48 and 49,
without any permission from Congress.

And why has the state the title to navigable waters and the soil under them? Plainly because such waters are devoted to a public use as public highways. It is not necessary to go beyond *Shively vs. Bowlby*, to find an answer to this question.

Now, in the arid regions, irrigation is a public use of importance no less than is navigation in the more humid sections. The great empires now arising in majesty out of the heart of the American Desert, could never have been heard of, as their courts have declared, were it not that their waters have been held devoted to this great public use. The Supreme Court of the United States did not hesitate to say in

Fallbrooke Irrig. Dist. vs. Bradley, 164 U. S. 112-164.

"We have no doubt that the irrigation of really arid lands is a public purpose, and the water thus used is put to a public use." It is declared to be such by the constitution and statutes of nearly every western state.

Now if the state owns the navigable waters within its borders, because they are devoted to a public use, why does it not equally own the non-navigable waters in those states where they are, and since civilization had its feeble beginnings within their territory, have been de-

voted to a public use?

A recent able opinion of the Court of Chancery of the State of New Jersey takes the position that the state owns all the waters within it, and supports its views by a learned and well reasoned opinion.

McCarter vs. Hudson County Water Co., 65 Atl. 489.

If the State of New Jersey enjoys such a proprietary right in the waters within its boundaries, so must each western state, or it would not have been admitted to the Union on an equality with the original states. It was upon this consideration that, notwithstanding its general proprietorship of the lands in the newly acquired western territory, it was held the general government did not become the owner of lands under tidal and navigable waters, and a patent from it to such lands would be void.

It is alone upon this theory that the legislation of the western states, prescribing the manner and conditions of the acquisition of a water right can be justified. If the general government owns the waters of the streams flowing through the public domain, what right has a state to pass laws looking to their disposition? Why must one adhere to the laws of Montana or of Wyoming in the acquisition of a water right in those states, respectively, if the property right to be acquired belongs neither to the one nor to the other, but to the United States? Are all these laws, truly enacted with reference to a subject matter of which the states have no jurisdiction whatever? Not at all. They are legislating with reference to the disposition of their own property and their own rights, and Congress recognized this in the Act of 1866. The validity of legislation of this character was upheld

in

Gutierrez vs. Albuquerque Land & Irrig. Co.
188 U. S. 545.

Now if the complainant and the intervenor in this case must look to the State of Wyoming for whatever rights they have to the waters of Sage Creek, it follows logically that they have no water right which they can assert in this Court against these defendants. If the State of Wyoming owns all the waters in that state, it follows, "as the night the day," that the State of Montana owns all the waters in that state; that neither the one nor the other enjoys any priority, and that neither can grant any priority as against the other, or any of its grantees. This theory of the ownership of water rights contemplates that from the beginning the waters were held in trust for the people of the State that was to be, and which eventually became the owner when it came into existence. Montana owns all the waters within its borders, and Wyoming owns all the water within its borders, each being entitled to dispose of them as it sees fit.

If Montana allows any of her waters to flow down into Wyoming, they belong to the latter state, of course. If any one allows tailings to run away from his mill and to be deposited upon the land of another, having at the time no purpose to reclaim them, they become affixed to—a part of the land on which they lodge.

1 Lindley on Mines, 426.

If Wyoming should allow any of its waters to flow down into Nebraska, they belong to that state.

Montana is under no obligation to give any part of her waters to Wyoming, nor to allow them to flow down into that state, that they may be enjoyed by Wy-

oming licensees of grantees. When appellee Morris and Howell constructed their diversion works, they are presumed to have known that more or less of the waters they were seeking to appropriate came down from Montana, and that she and her citizens might eventually desire to make use of them. So, if one constructed a cyaniding plant on the lower courses of a stream, and caught tailings coming down, he could not complain if the owner of the mill from which they came decided to change his policy, and impound them.

This view of the law and of the rights of the states gives no advantage to Montana, nor to any state. What more reasonable rule than that the people of Montana own the waters that fall from the heavens upon their soil and that they are, and of right ought to be, entitled to place them to any beneficial use they may see fit until they pass beyond the borders of that state? So Wyoming owns all the bounties of the heavens that fall on her fields and mountains, but when she allows them to get away from her into Nebraska or Kansas, she has no means, as she has no right, to reclaim them. Why should the states east or west, as the climate grows more and more humid, claim not only the rain that falls on them, but a part of that which comes to bless their neighbors in the higher and dryer regions?

But if it were a fact that this theory of the law would place the people of Montana at an advantage, that is their good fortune. They may enjoy it themselves, or they may admit their neighbors to share it with them. In

McCreedy vs. Virginia, 94 U. S. 391,
the Court held valid a law of Virginia excluding citizens of other states from planting oysters within tide waters

of that state. It was held that, as these waters belonged to the State of Virginia and its people, they might reserve them to their own use, or share them with others, as they saw fit.

Once the proposition is admitted that the state owns the water—all the water—of all the streams within its borders, it follows that it may establish the system of riparian rights or of appropriation whichever it sees fit, and it equally follows that a citizen of one state diverting water from a stream therein can claim no ownership in, or right to, waters of any stream while they are within a neighboring state, but that the right to such waters, and to the use of them, is, and must be, in the state wherein they are, or in some one who is taking them from the stream by authority of that state.

This is the position taken by the State of Colorado in the action now pending between it and the State of Kansas in the Supreme Court of the United States. It was argued before that august tribunal on a demurrer to the bill in the suit referred to, and expressly reserved as too grave to be passed on until the necessity to do so arose, if it should, on the final hearing.

Kansas vs. Colorado, 185 U. S. 125.

The Supreme Court of Colorado considered a closely related question as to whether water could be diverted and appropriated in Colorado for use on lands in New Mexico, but found it unnecessary to decide the question.

Lanson vs. Vailes, 61 Pac. 231.

The same question involved in the last cited case was presented to the Supreme Court of Wyoming.

Willey vs. Decker, 73 Pac. 210.

That Court, having committed itself unqualifiedly to the

rule of state ownership—the “Colorado doctrine”—reaches the conclusion by a course of reasoning difficult to trace, that the courts of that state may enjoin one who, under its laws, diverts water in that state from a stream having its source in Montana, of whose waters defendant made an earlier appropriation in Wyoming, but for use in Montana. It is but just to say that though the question was deemed by the trial judge so important that he certified it up pursuant to a provision of the constitution of that state, the Court itself declares that it did not have the assistance of counsel for the defendant. It had but one side of the case argued, and decided in favor of the party represented.

The question presented could have been readily solved upon a theory in entire harmony with the views of the Court expressed in earlier opinions. It would have been sufficient to say that the State of Montana had not abandoned to the State of Wyoming and its citizens all the water which it allowed to run down the stream in question, but only so much as was in excess of the needs of the plaintiff for use in Montana. The very fact that the Montana citizen was ready with his ditch to take it out, though in Wyoming, to carry it on to lands in Montana disproved any intention to abandon. It presented simply a question of the right of the Montana claimant to occupy the Wyoming soil with his ditch; or at most, the question of whether the Wyoming law permitted him, a citizen of Montana, to come within the State of Wyoming and carry water through this ditch to lands beyond its borders. That question is clearly determined wholly by the construction of the Wyoming statutes. In fact the Court recognized, in one part of its opinion,

that this was the real question in the case. (73 Pac. 222.) But the Court proceeded to the consideration of the case as though it presented the identical question involved in this action, whether an appropriator in Wyoming can come into a court in Montana and enjoin an appropriator in Montana from diverting water from a stream that flows throughout its course as far as the point at which he diverts it for use on lands in Montana.

The views expressed by the Court in

Farms Investment Co. vs. Carpenter, *supra*, are reiterated at considerable length.

The attention of the Court was invited to the irreconcilability of the position taken by the learned District Judge in *Howell vs. Johnson*, *supra*, and that assumed by the Wyoming court in the case named,—the one asserting a Federal, and the other a State origin of water rights. On that very difference of opinion, the decision in *Howell vs. Johnson* turned, the counsel for the defendant taking the position asserted by the Wyoming court in *Farms Investment Co. vs. Carpenter*; the Court, the other view. Because, the Court held, the right to the water came by grant from the general government, not restricted in the disposition of the public lands and their incidents by state lines, a right was acquired by complainant, which he could assert anywhere.

Though the decision in *Howell vs. Johnson* was called to the attention of the Court in *Farms Investment Co. vs. Carpenter*, by the brief of counsel (9 Wyo. 113), the Court refused to follow its reasoning, and yet when it canvasses, in *Wiley vs. Decker*, *supra*, the question it assumed to be involved, it said:

“The Federal Court sitting in Montana recognized a similar right in the case of a Wyoming appropriator from another stream flowing from Montana into Wyoming, and held that an invasion of his rights by the diversion of water in Montana might be enjoined. *Howell vs. Johnson* (C. C.) 89 Fed. 556. In that case the learned judge said: ‘The idea that there can arise any international water right question in the case of an appropriation of the waters of an unnavigable stream cannot be maintained. The rights to such waters, after the national government has disposed of them, must always be a question pertaining to private persons.’ Some expressions contained in the opinions in that case, in respect to state ownership and control of the waters of unnavigable streams have been supposed destructive of an essential principle in the law of irrigation. It is not necessary that we agree with all the reasons given by the Court for the conclusion announced, nor that we assent to all the views expressed in the opinion. We think there can be little question but that it was rightly held that the plaintiff in the case had secured a right by appropriation to the waters of the stream, as against a subsequent appropriator in the other state, which might be protected in the courts of such state against injury by acts occurring therein.”

The case is not persuasive for the reasons suggested.

Perkins County vs. Graff, 114 Fed. 441, is referred to in *Willey vs. Decker*, as shedding some light on the questions involved. It is more pertinent to the case there presented than here. It involved the question of the validity of bonds issued to bring water out of a stream

in Colorado for the irrigation of lands in Nebraska. It can be seen that, at best, that simply presented the question as to whether such permission was granted by the laws of Colorado, and nothing in the opinion aids us in the solution of the question here involved.

The matter came incidentally before the Court in *Cenat vs. Deep Creek Co.*, 66 Pac. 188, and without much attention to the subject, apparently. *Howell vs. Johnson* was approved.

The question is to be solved, as we submit, by a determination of the question as to whether the right arises by a grant from the general government, or whether the citizen of a state enjoys his appropriation by virtue of the state's ownership of waters within its borders. It is respectfully submitted, for reasons considered, that the latter theory must be adopted, as more consonant with the views expressed by the Supreme Court of the United States.

II.

THE RIGHTS ACQUIRED IN WYOMING WERE SUBORDINATE TO THE RIGHTS ACQUIRED IN AND ON THE CROW INDIAN RESERVATION IN MONTANA.

But there is a special reason why, even though the principle should not be deemed of universal application, the result to which it leads must be arrived at here. The Crow Indian Reservation, defined by the Treaty of May 7th, 1868, embraced all of the County of Carbon, Montana, its southern boundary being coincident with the southern boundary line of that state.

Revision of Indian Treaties, p. 327.

By the treaty of 1890 the lands occupied and owned by

the appellants and watered by them from Sage Creek, as well as the head waters of that stream, were thrown open to settlement. Theretofore, no one was permitted to go within that region to acquire either lands or water rights. The citizens and settlers of Wyoming might occupy the territory right up to the Montana line for a stretch from the 107th Meridian West, to where the Yellowstone River crosses it, a distance of 150 miles, and might, if the contention of the appellant is correct, appropriate every drop of water collected in that vast and now marvelously productive and wealthy region, which should flow southward, leaving it, when it should eventually be open to settlement, a parched and hopeless desert. By what right may the citizens of Wyoming thus claim a priority in these waters over those of Montana? If they may, our state is most grievously burdened by its even now vast Indian Reservations. When they are eventually opened, as they are now fast being, we may find that citizens of other states have, by virtue of acts done therein, acquired the right to come within our state and appeal to the courts to divest the settlers on them, of the waters taken from the streams that flow through their lands, and have their sources within the newly opened territory.

Fortunately, a recent decision of this Court promises to exempt us from such a calamity. It was held in

Winters vs. The United States, 143 Fed. 740, that the waters flowing through, or bordering on the Belknap Indian Reservation were reserved for the use of the Indians occupying the Reservation, and were not subject to appropriation.

The same consideration which led the Court to the

conclusion at which it arrived in the case forces the conviction that the waters in question in this case were not subject to appropriation until after the opening of the Crow Reservation, and then at least for a reasonable time only by the settlers thereon.

The Government recognizes a kind of property right on the part of the Indians to the waters as well as the lands of the reservation. In *Winters vs. U. S.*, this view is adopted. For many years the policy has been pursued of reducing the area of these reservations upon some consideration flowing to the Indians. Our whole vast state, or the greater portion of it, was at one time one or more Indian reservations.

Winters vs. The United States, supra.

It was contemplated many years ago that eventually the lands within the reservations would be thrown open to settlement, and an equivalent given to the Indians. More recent statutes provide for the entry of land so opened under the homestead law, with a payment, the benefit of which flows to the Indians. Such are the provisions of a late act of Congress again reducing the limits of the Crow Reservation.

Is it possible that citizens of Wyoming, under the sanction of either state or federal legislation, had the right to appropriate to themselves all the waters of the reservation by diversions made in Wyoming so that when they should eventually be thrown open to settlement, the Indians could realize nothing for their lands over and above the trifle at which they would sell for purely grazing purposes?

An act passed at the last session of Congress opening the Blackfeet Reservation, applying the law announced in

Winters vs. United States,

provides for the allotment in severalty to the Indians of lands in the reservation, and the entry of the remainder at a price fixed, the amount realized to become a trust fund for the Indians, and further provides that *not only the Indians but the settlers purchasing*, shall have a prior right to the use of so much water as they may divert for the purpose of irrigation within two years from the opening of the reservation. The priority given to the settlers is given, of course, to increase the salability of the lands. Can it be denied that such a provision in the act of opening the Crow Reservation would have been valid, and that the settlers on the reservation would have had the priority? But if they would it would be because the Wyoming diverters had acquired no right, since if they had acquired a priority right they could not be diverted of it by a subsequent act of congress.

As the waters of the Crow Reservation were not subject to appropriation when the complainant and the intervenor claim to have made their appropriations, they cannot maintain this action. At least a court of equity will not put forth its arm to aid in the enforcement of so inequitable an advantage if, even as a matter of strict legal right, the appellees enjoy it.

The suggestion made by the learned district judge that assuming that the waters were not subject to appropriation prior to the opening of the reservation, the appropriations became effective *eo instanti* upon the accomplishment of that fact, does not meet the case, and nothing in the decisions cited in support of this view seems to sustain it. The waters are for all practical purposes subject to appropriation, if, immediately upon the reser-

vations being opened, prior appropriations take life as against those made on the land made subject to entry. However diligent settlers on the newly opened lands might be, they could by no possibility secure a priority.

Under the law as announced in the Winters case, the right to the use of water on the reservation belonged to the Indians as an incident of their ownership or their right to occupy the lands within it, and passed on the opening of the reservation to those who appropriated the lands under the act of Congress making them subject to entry.

III.

LACHES, ADVERSE USER AND ABANDONMENT.

And if the court ever would give to appropriators such an advantage, it ought not to do it in this case where the evidence shows that the appellees slept on their rights for ten years and more before bringing this action.

It is conceded that as to the intervenor—in fact he himself tells—that he began to suffer because of the want of water in the fall of the year 1893, the shortage being occasioned by the diversions of the defendants. His petition was filed September 5, 1903.

The complainant says he has been short of water since 1894 because the defendants have taken it, and the evidence is undisputed that he has not raised any crops for five or six years. No explanation whatever of this long delay is made; no excuse is offered. No reason is assigned why this suit or some similar action was not begun long ago. The appellants might very well believe, by reason of this long inactivity and failure to question their rights or to interrupt their acts that their right to

the water was conceded. Assuming it to be, they made expensive improvements by which their lands have become producing farms and orchards. The character of improvements—if that term can be used properly in this connection—on the lands of complainant and intervenor is shown by photographs introduced in evidence.

Transcript, pages 428-429.

The full period of the statute of limitations of both Montana and Wyoming has run against the claim of the intervenor, ten years barring actions to recover realty in both states. But a Wyoming statute is more important. It provides:

“And in case the owner or owners of any such ditch, canal or reservoir shall fail to use the water therefrom for irrigation or other beneficial purposes, or shall refuse to furnish any surplus water to the owner or owners of lands lying under such ditch as hereinafter provided, during any two successive years, they shall be considered as having abandoned the same, and shall forfeit all water rights, easements and privileges appurtenant thereto, and the waters formerly appropriated by them may be again appropriated for irrigation and other beneficial purposes, the same as if such ditch, canal or reservoir had never been constructed.”

Sec. 895, Rev. Stats. Wyoming, (1899).

The learned district judge erroneously considered this as a statute of abandonment, and held that the intention to abandon not being shown, the statute is inapplicable. This is a statute of non-user, not of abandonment. It is immaterial why the complainant or intervenor did not use the water. Their failure to use it worked a forfeiture

of their right. The difference between a statute of non-user and one of abandonment is pointed out in

Long on Irrigation, 83.

Abandonment is a question of intent. Failure to use the water, no matter how long continued, does not constitute abandonment. Non-use is evidence of abandonment, but the intent is the essential feature. And on the other hand, if a purpose is established not to use any more, it is immaterial how long the non-use has continued.

Under a statute of non-use, however, failure to use for the statutory period, whatever the reason, or however strong may be the purpose to use again at the first opportunity, works a forfeiture. These principles are sustained by the case of

Smith vs. Hawkins, 110 Cal. 122.

The statute operates as a statute of limitations. No other construction can possibly be given to the statute. The purpose to make the waters of the state available to the utmost is evident throughout the legislation of the State of Wyoming. In the absence of this law, water which had been appropriated but the right to which the appropriator intended to abandon, would have become subject to appropriation by another the instant he carried out his purpose and ceased using. It certainly was not intended by this law that notwithstanding one had formed a fixed purpose not to use the water again, it should remain unavailable for a period of two years during which time he might be at liberty to change his mind and reclaim it. Clearly not. Its purpose was to fix a limit after which one might safely take it and apply it at expense to some beneficial use without being met subse-

quently with proof of a purpose on the part of the original owner to resume its use at some later day.

In this case the intervenor frankly and bluntly tells that he quit using the water or trying to use it in 1897, and determined not to attempt any further raising of crops until his right to the water should be settled. But under this statute he was obliged, having reached that determination, to commence his action within two years. His averment of a present right to the use of the water is overcome by the facts he submitted in proof.

The evidence places the complainant in the same position. He too has delayed too long.

Nor is it necessary that the *whole* period of the statute should have run in order that the complainant and intervenor should be denied a right of recovery in this suit.

Appeal is made here to a court of equity. The complainant and intervenor are not entitled to a decree when they show only a strict legal right. They ask for the extraordinary remedy of injunction. The prayer for the injunction is the basis of the jurisdiction, and it is the only relief awarded. The necessity for the prompt and diligent assertion of his rights on the part of one seeking the aid of equity has been repeatedly declared by the Supreme Court of the United States. In

Abraham vs. Ordway, 158 U. S. 416,
is the following:

“The property in dispute, it may well be assumed, has greatly appreciated in value since Mrs. Ordway’s purchase, which was more than ten years prior to this suit. It is now too late to ask assistance from a court of equity. The relief sought cannot be given consistently with the principles of justice, or with-

out encouraging such delay in the assertion of rights as ought not to be tolerated by courts of equity. Whether equity will interfere in cases of this character must depend upon the special circumstances of each case. Sometimes the courts act in obedience to statutes of limitation; sometimes in analogy to them. But it is now well settled that, independently of any limitation prescribed for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done, in the particular case, by granting the relief asked. It will, in such cases, decline to extricate the plaintiff from the position in which he has inexcusably placed himself, and leave him to such remedy as he may have in a court of law. *Wagner vs. Baird*, 7 How. 234, 238; *Harwood vs. Railroad Co.* 17 Wall 73, 81; *Sullivan vs. Portland, etc. R. R.* 94 U. S. 806, 811; *Brown vs. the County of Buena Vista*, 94 U. S. 157, 159; *Hayward vs. National Bank*, 96 U. S. 611, 617; *Landsdale vs. Smith*, 106 U. S. 391, 392; *Speidel vs. Henrici*, 120 U. S. 377, 387; *Richards vs. Mackall*, 124 U. S. 183, 188.

“The appellants insist that, as this suit relates to land, the doctrine of laches as announced in the above cases, has no application. There is no foundation in the adjudged cases for this suggestion. It is true, as stated by counsel, that in *Wagner vs. Baird*, just cited, the court says that in many cases courts of equity ‘act upon the analogy of the limitation of law, as where a legal title would in ejectment be barred by twenty years’ adverse possession,’ and ‘will

act upon the like limitations, and apply it to all cases of relief sought upon an equitable title, or claims touching real estate.' But it proceeds to say: 'But there is a defense peculiar to courts of equity founded on lapse of time and the staleness of the claim, where no statute of limitation distinctly governs the case. In such cases courts of equity often act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere where there has been gross laches in prosecuting rights, or long acquiescence in the assertion of adverse rights. 2 Story Eq. Sec. 1520. A court of equity will not give relief against conscience, or where a party has slept upon his rights.' "

From

Insurance Co. vs. Austin, 158 U. S. 685,
we make the following extract:

"The preliminary inquiry, therefore, is whether the complainants have so exercised their rights as to entitle them to prevent the city from completing the water works.

"In *Speidel vs. Henrici*, 120 U. S. 377, 387, the court said, speaking through Mr. Justice Ray:

" 'Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights, and shows no excuse for his laches in asserting them. 'A court of equity,' said Lord Camden, 'has always refused aid to stale demands, where the party slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience,

good faith and reasonable diligence; where these are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced; and, therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court.'

"In *Hammond vs. Hopkins*, 143 U. S. 224, 250, through Mr. Chief Justice Fuller, the court said:

" 'No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith and reasonable diligence, but will discourage stale demands for the peace of society, by refusing to interfere where there has been gross laches in prosecuting rights, or where a long acquiescence in the assertion of adverse rights has occurred.' "

In *Willard vs. Woods*, 164 U. S. 502, 524, the Court said:

" 'But the recognized doctrine of courts of equity to withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time may be applied in the discretion of the court, even though the laches are not pleaded, or the bill demurred to. *Sullivan vs. Portland, & Kennebec R. R.* 94 U. S. 806, 811; *Lansdale vs. Smith*, 106 U. S. 391, 394; *Badger vs. Badger*, 2 Wall. 87, 95.' "

In the opinion filed by the learned District Judge, who ordered the decree in this cause, it is said in extenuation of, if not as a complete answer to, the claim of laches on the part of the complainant that he "has protested while the supply of water grew less from year to year until

finally his ills became unbearable.”

Transcript, page 653.

Even if he had done so, his conduct would be no answer to the claim of laches. In *Willard vs. Woods*, already quoted from, the court said:

“In *Lane vs. Bodley Co.* 150 U. S. 193, and *Mackall vs. Cafflear*, 137 U. S. 556, it was held that the mere assertion of a claim, unaccompanied with any act to give effect to the asserted right, could not avail to keep alive a right which would otherwise be precluded because of laches.”

But what are the facts?

The complainant testifies that he never made any complaint whatever about the water, that in the year 1898 he saw appellant Bean about water. Just what he said to Bean does not appear, but whatever he said was not by way of complaint. Bean said: “that he was going to irrigate that afternoon and he would turn the water down, and he turned the water down the creek, and it run about a half a day; then the water was shut off again.”

Transcript, page 259.

In the year 1902, he went to see appellant, Wallace Bent. What was said to Bent does not appear in the record, but the complainant says: “Mr. Bent said that he would not let me have any water.”

Transcript, page 258.

Complainant testifies that these two efforts are all he can remember to have made.

Transcript, page 250.

The testimony is entirely consistent with the idea that he requested that the water be allowed to come down to him as a neighborly accommodation.

The intervenor, it will be remembered, testified that complainant had been unable to raise any crops since 1894. He, himself, testified that he had not had more than half enough water for five years.

It does appear, indeed, in the evidence that at one time the intervenor instituted a suit such as this—doubtless the case of *Howell vs. Johnson*—but there is no pretense that it was brought against any of these appellants. While, on the issue of abandonment, the prosecution of a suit against some one other than these appellants would be pertinent as showing his intent to use the water again, on the issue of laches raised by them, it is no answer at all.

Ignorance of the wrong is the usual excuse for laches. Of course, if protest were made, it would be impossible to aver ignorance. Such a condition would tend to establish, rather than overcome laches.

The burden of establishing facts to overcome the indisposition of courts of equity to enforce rights where long delay in their assertion has ensued, is on the complainant, and unless he avers the existence of such facts in his bill, it is demurrable. In

Hardt vs. Heidweyer, 152 U. S. 547,
the court says:

“It is well settled that a party who seeks to avoid the consequences of an apparently unreasonable delay in the assertion of his rights on the ground of ignorance must allege and prove, not merely the fact of ignorance, but also when and how knowledge was obtained, in order that the court may determine whether reasonable effort was made by him to ascertain the facts.”

The Court also in that case quotes from *Badger vs. Badger*, 2 Wall. 87, 95:

“ ‘The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matter alleged in his bill.’ ”

To avoid, apparently, the force and effect of this rule, the complainant alleged in his bill that the wrongs complained of had continued only during “the past three years,” that is, the years 1900, 1901 and 1902. He did not frame his bill on the theory that he had been deprived of his water by any act of the defendant since the year 1894, because, had he done so, the bill would have been demurrable for laches appearing upon its face. Even if he had averred that, for five years, he had been deprived of water essential to the raising of crops, some explanation of his delay would have to be made in his bill, before a court of equity would interpose in his behalf. It might, in this connection, be remarked that, prior to 1895, five years would, in Montana, have absolutely barred his rights, as is the case, or until recently was the case, in California. What excuse could now be made in the bill, if leave were asked to amend it to make it conform to the proof?

Take the case of the intervenor. He expressly averred that he has had the use of his appropriation to its full extent since August 1st, 1890, which sweeping assertion he followed with the further averment that, within five years the defendants had constructed dams and ditches,

and that within two years they had deprived him of the water to which he is entitled.

Suppose he had averred in his petition that he had been unable to get water since 1894 sufficient to grow crops, and that in despair he quit trying to raise them after 1897; he would, likewise, have been obliged to make some averment to relieve himself of his evident laches in seeking relief. And what avail would it have been to him, in opposition to a demurrer by these appellants, to have averred in his petition that, at some time in the interim, he had begun an action against somebody to prevent interference with his right.

Even though a strict right may possibly be in the parties in whose favor the decree runs, they have no standing whatever in a court of equity. If a complete case of estoppel is not made out, in view of the expenditures made by the appellants in reliance upon their right to the water, a case is presented in which, if it ever should, the doctrine of laches ought to be applied.

IV.

EXTENT OF RIGHTS OF COMPLAINANT AND INTERVENOR.

And particularly should it be applied in view of the pettiness of the right which the complainant established. His claim that he irrigated one hundred acres is without any support whatever in the record, and the overwhelming weight of the evidence, referred to in the earlier part of this brief, is to the effect that he never watered more than twenty-five acres. He had the uninterrupted use of the water from 1887 to 1893. After seven years the extent of his right ought to be measured by the applica-

tion he has made of the water diverted. He had had abundant opportunity since 1887 to put so much of his one hundred and sixty acres under cultivation as he saw fit. The intervenor put 110 acres of his land under cultivation between 1900 and 1903.

There is no justification in the testimony for awarding to complainant any more water than is sufficient for the irrigation of twenty to twenty-five acres. The evidence would justify an inch to the acre, but a law of the State of Wyoming forbids awarding any more than one cubic foot per second for each seventy acres of land, for which any appropriation may be made.

“At the first regular meeting of the board of control, after the completion of such measurement by the state engineer, and the return of said evidence by said division superintendent, it shall be the duty of the board of control to make, and cause to be entered of record in its office, an order determining and establishing the several priorities of right to the use of waters of said stream, and the amounts of appropriations of the several persons claiming water from such stream, and the character and kind of use for which said appropriation shall be found to have been made. Each appropriation shall be determined in its priority and amount, by the time by which it shall have been made, and the amount of water which shall have been applied for beneficial purposes. *Provided*, That such appropriator shall at no time be entitled to the use of more water than he can make a beneficial application of on the lands, for the benefit of which the appropriation may have been secured, and the amount of any appropriation

made by reason of an enlargement of distributing works, shall be determined in like manner. *Provided*, That no allotment shall exceed one cubic foot per second for each seventy acres of land for which said appropriation shall be made."

Section 25, Act of 1890- Laws of Wyoming 1890-91, page 98

The application to a beneficial use is an essential part of an appropriation. If the water was never applied to the irrigation of more than twenty-five acres no appropriation was ever made for more than twenty-five acres. This law, as well as the one above referred to touching non-user, becomes a part of the right, a limitation to which it is subject in any state where an attempt may be made to enforce it.

Davis vs. Mills, 194 U. S. 451.

Another law of Wyoming provides:

"A cubic foot of water per second of time shall be the legal standard for the measurement of water in this state, both for the purpose of determining the flow of water in natural streams, and for the purpose of distributing water therefrom."

Section 38, Act of 1890, Laws of Wyoming, 1890-91, page 102.

In view of these legislative acts it is difficult to see how the decree in this case can be sustained, either as to the complainant or the intervenor. The complainant affords no basis in his bill for a decree awarding him water measured by the standard by which alone he is entitled to have it decreed to him under the Wyoming law. On the other hand the intervenor avers in his petition that he is entitled to 6 1-4 cubic feet per second

and without any averment whatever in his petition advising the court as to the quantity of water that is measured by the miner's inch as the standard, he is awarded, 110 inches, miner's measurement.

The petition in intervention does not support the decree in behalf of the intervenor; it is unsupported in respect to the amount awarded by any pleading whatever. The rule that the judgment must be supported by the pleadings is as firmly established in the equity practice as it is at law.

Fletcher's Equity, 712.

Nor would the situation be improved if proof had been made of the relation between the two methods of measurement, for it is the rule in equity also that "the court can no more consider what is proved, but not alleged, than what is alleged, but not proved."

Fletcher's Equity, 636.

The complainant's case is in no better shape. He avers an appropriation of 250 inches statutory measurement and is decreed 100 inches "miner's measurement."

A Montana statute provides as follows:

"Section 2. Where water rights expressed in miners' inches have been granted, one hundred miners' inches shall be considered equivalent to a flow of two and one-half cubic feet (18.7) gallons per second; two hundred miners' inches shall be considered equivalent to a flow of five cubic feet (37.4) gallons per second, and this proportion shall be observed in determining the equivalent flow represented by any number of miners' inches."

Session Laws, 1899, page 117.

But that, however, is an arbitrary statutory rule, and it need not be said that the extent of the rights of complainant and intervenor is to be determined by the Wyoming law, not that of Montana. But if the relation between the two standards fixed by the Montana law should be regarded, then intervenor, irrigating one hundred and ten acres, is entitled, not to one hundred and ten inches of water, but to forty-seventieths of one hundred and ten, or sixty-three inches; and complainant is entitled to forty-seventieths of twenty-five inches or fourteen inches.

But if the Wyoming law making the cubic foot per second the standard of measurement and limiting the right of the appropriator to one cubic foot for each seventy acres is to be disregarded, still the decree is so indefinite as to the amount awarded as to be incapable of enforcement. What quantity of water is a miner's inch? It is one quantity in one community and another in another.

The Court held in

In re Huntley, 85 Fed. 889-983,
that a decree awarding "150 inches, statutory measurement," is void for uncertainty.

Long on Irrigation, 97,
says:

"So, also, where the plaintiff alleged in his complaint that he was entitled to 'five hundred inches, measured under a four-inch pressure,' of the waters in controversy, a verdict of the jury that he was entitled to 'forty inches, miners' measurement,' was held void for uncertainty, since the term 'miners' measurement' has no fixed meaning, and the miners'

inch varies in different localities,"
and for the text the author refers to

Dougherty vs. Haggin, 56 Cal. 522.

It is well known that, other considerations being disregarded, water is measured by miners in some places under a four inch pressure and in others under a six inch pressure. Anyway, the amount of water to which the complainant is entitled (we say nothing of the intervenor because it seems altogether clear that as to him the decree cannot be sustained) is so pitifully small that in view of his laches, he ought not to have the equitable remedy of injunction against these defendants.

V.

THE SINKING OF THE WATERS OF SAGE CREEK

And to whatever conclusion the court may arrive on consideration of the voluminous testimony concerning the character of the bed of Sage Creek, as to whether water in sufficient quantity to be of any substantial value to him would reach complainant's place were the flow uninterrupted by the defendants, it is undeniable that a quantity vastly in excess of anything to which complainant may be entitled, must be allowed to run down, in order that he may get the trifling quantity to which his limited irrigated area entitles him.

It is submitted that the very decided preponderance of the evidence is that though the appellants diverted no water, complainant would get none—once the dry season sets in, before which there is enough for everybody. But whether that is true or not, it would be inequitable and unjust that the appellants should be deprived of two to three hundred inches of water that complainant may get not more than 25. This condition affords an addi-

tional reason why he should be relegated to a court of law for such relief as he can there obtain, and he should be held barred of his equitable remedy by his long and unexcused delay in seeking it.

VI.

AMOUNT IN CONTROVERSY.

The consideration of the inconsequential character of the interest which the complainant succeeded in establishing leads to the question of the amount in controversy.

The bill alleges that the amount in controversy exceeds \$2000, exclusive of interest and costs, but whether it does or not is to be determined from the facts stated. If the just conclusion from those facts is at variance with the mere conclusion of law which the averment referred to expresses, it can have no weight. The thing in controversy, as was justly said by the learned district judge, is the complainant's water right. On the value of that right depends the jurisdiction of the court. That right is averred in the bill to be of the value of \$2000.

Transcript, page 5.

Of course, a controversy involving a right of the value of \$2000 does not fall within the jurisdiction of the United States Circuit Court. The amount involved must exceed \$2000.

It is true the bill avers that the complainant has been damaged in the sum of \$2500 by defendants' interferences with his water right, but damages in equity can be awarded only as incidental to the main relief. The jurisdiction to award damages is a *dependent* jurisdiction. If the court of equity has no jurisdiction over that feature of the controversy, by reason of which alone it is entitled to hear the cause, because the value of the litigated right

is not sufficiently large, its jurisdiction cannot be helped out by the amount of damages claimed in consequence of an invasion of that right.

But more. The damages that might be awarded could not by any possibility exceed the value of the property right injured. One cannot recover damages for injury to property in excess of its value.

Lentz vs. Carnegie, 27 Am. St. Rep. 717.

If the complainant were, by proceedings in eminent domain, deprived for all time of his water right his damages, conceding its value as averred in his bill, would be just \$2000. It is apparent, then, that that is the amount in controversy. Accordingly, we insist that the bill shows on its face that the court has no jurisdiction and we submit that the evidence confirms the want of jurisdiction disclosed by the bill.

Undoubtedly in actions "sounding in damages" the amount claimed as damages controls. But this is not an action sounding in damages. It is an action in equity for an injunction, damages being asked as merely incidental relief. It is more nearly like an action to quiet title in which the value of the property is the test.

Simon vs. House, 46 Fed. 317;

Smith vs. Adams, 130 U. S. 167.

"In determining from the face of a pleading whether the amount really in dispute is sufficient to confer jurisdiction upon a court of the United States, it is settled that if from the nature of the case as stated in the pleadings there could not legally be a judgment for an amount necessary to the jurisdiction, jurisdiction cannot attach even though the damages be laid in the declaration at a larger sum. Bar-

ray v. Edmunds, 116 U. S. 550, 560; Wilson v. Danier, 3 U. S. 3 Dall. 401, 407.”

Vance vs. Vanderecook, 170 U. S. 468-472.

“Value Distinguished from Amount—Property Rights Involved.—Where property itself or its title is in litigation, or some question *per se* affecting its enjoyment and possession, its value is the real matter in controversy, as distinguished from the claims of the contending parties.”

1 Ency. Pl. & Pr., 726.

For want of a showing by the bill of a dispute in which the amount exceeds \$2000, the court never acquired jurisdiction. On principles elsewhere adverted to the finding of the court that the complainant's right is of the value of \$3200 does not aid. The decree must be supported by the bill. The finding was made, of course, on the basis of a right in the complainant to 100 inches.

VII.

CITIZENSHIP OF INTERVENOR.

It is conceded that the intervenor, Howell, is a citizen of Montana. He resides at Billings, in that state. No attempt was made to show that at the time of filing his petition, or at any time since, he resided in Wyoming.

The decree, so far as it awards him any rights, cannot stand. It is sought to justify it on the ground that the jurisdiction of the court being invoked by complainant Morris, Howell had a right to intervene, and have his rights adjudicated, even though he should be a citizen of Montana. To this proposition we most respectfully dissent. It is conceded that when, by virtue of any action, property is brought before the Federal Court of Chancery, which is to be disposed of in the action, any

person claiming an interest in the property may be made a party without regard to citizenship. Thus, in an action to foreclose a mortgage, judgment creditors or holders of mechanics' lien may be admitted as parties, for the purpose of establishing their rights, without reference to their citizenship.

Lilienthal vs. McCormick, 117 Fed. 89.

So in admiralty, which usually proceeds *in rem*, any one claiming a lien upon, or interest in the property in litigation may come in.

It is plain from

Rouse vs. Letcher, 156 U. S. 47,

that to warrant an intervention without respect to the citizenship of the intervenor, the property that is the subject of the action must be *in custodia legis*. But there is no property before the Court in this case. There can be none. The property which was made the subject of the bill of complaint—complainant Morris' water right—is not in Montana, but in Wyoming, beyond the jurisdiction of the court. The jurisdiction to proceed at all in this case can be maintained only on the theory that it is a purely personal action.

The Circuit Court for the District of Montana cannot adjudicate on water rights in the State of Wyoming.

Conant vs. Deep Creek Co., 66 Pac. 188.

But, finding within its jurisdiction one who threatens to do the complainant a wrong with reference to property beyond its jurisdiction, a court of equity will bring his person before it, and restrain him from doing that wrong. This case proceeds upon the theory of

Penn vs. Lord Baltimore, 1 Ves. 444, and

Massey vs. Watts, 6 Cranch. 148.

(See Notes to Penn vs. Lord Baltimore, in
(II. Leading Cases in Equity, 1817)

namely, that it is a personal action.

His appearance here can confer no jurisdiction on the court over any controversy between him and these defendants.

“The Circuit Court cannot take jurisdiction of an intervention in a merely personal action in which no fund has come into the possession of the Court by one who is a citizen of the same state as the party against whom his complaint is directed.”

Seligman vs. City of Santa Rosa, 81 Fed. 574.
In that case Judge Morrow referred to the case of
United Electric Co vs. La. Electric Co. 68 Fed.
673,

in which one of the propositions determined is thus expressed in the syllabus:

“Where jurisdiction rests upon the diverse citizenship of complainant and defendant, and during the proceedings, a third party, who is a citizen of the same state with defendant, intervenes, the court will have no jurisdiction of his controversy with defendant, unless the controversy between complainant and defendant is one which draws to the court the possession and control of defendant’s property, in which the intervenor claims some interest.”

Howell had no right to intervene in this action, and the order permitting him to do so was erroneous.

And, the complainant having voluntarily assented to his intervening, the jurisdiction of the court was destroyed.

Forest Oil Co. vs. Crawford, 101 Fed. 849.

In that case, the plaintiff, claiming an undivided interest in certain lands, brought his action to quiet his title, alleging diverse citizenship. Afterwards other citizens of the same state with the defendant were permitted to intervene, and establish with plaintiff their joint claim against the defendant. The Circuit Court of Appeals for the Third Circuit held the jurisdiction failed, saying:

“We cannot shut our eyes to the quite apparent fact that he voluntarily assented to the irregular proceedings by which his bill, even if otherwise maintainable, was made fatally defective by the misjoinder therein of others as his co-plaintiffs. He seems to have been entirely satisfied to have the interposing parties united with himself, to assert with them a joint claim, and to recover with them a joint judgment; and he should not, we think, be now relieved from the consequences of his association.”

Forest Oil Co. vs. Crawford, 101 Fed. 852.

Although this is not a joint judgment, nor do the intervenor and complainant prosecute a joint claim, still had they united in the first instance, as they might very properly have done, to assert jointly their several claims and to obtain a judgment requiring the defendants to allow to flow down the stream the sum of 110 inches and 100 inches of water, there could be no doubt that the court would be powerless to proceed for want of jurisdiction.

The court very properly held that it had no jurisdiction to adjudicate the rights of the defendants as against each other. But unless the intervenor is a citizen of some

state other than Montana, it had as much right to do so as it has to adjudicate the rights of the intervenor as against the defendants. The ruling which was made amounts to this—that had the complainant made Howell a defendant, and had Howell in his answer or in a cross-bill asserted his rights against all the other defendants, as he has done in his petition in intervention, the Court could not adjudicate them; but since he comes in as an intervenor, it may. Or had the complainant omitted to make one of the defendants parties, he might intervene, and get a decree adjudicating his rights, as against all the defendants, relief denied to him by reason of the fact that he is a citizen of the same state with the other defendants.

No authority is necessary to establish that when a fund is in court, even in a Federal Court, and parties are made defendants who claim an interest in it, their rights as against each other are properly adjudicated in the action.

VIII.

THE NOTICES OF LOCATION.

It was conceded in the trial court that the notice of his appropriation filed by the complainant did not conform to the requirements of the Wyoming law in force at the time the appropriation was made, but it was insisted, and the court held, that the method of making an appropriation defined by the statute was not exclusive but that by following it the appropriation related back to the initial act prescribed by the law to be done. And it was said that *Moyer vs. Preston* had practically so held, which is doubtless true.

But it will be impossible, as we take it, for

any court to hold that since the enactment of the law of 1890 it is possible to acquire a water right in Wyoming except upon compliance with its terms. The whole scheme and purpose of that act was to do away with the contentions and controversies, the uncertainties that arose by reason of promiscuous appropriations made without any official surveillance. The scheme of the act was to afford, through the office of the state engineer, exact information to subsequent appropriators as to the quantity of water already appropriated from any particular stream; to deny to any person the right to place upon record a notice of appropriation of water in amount vastly in excess of what he could beneficially use, and to prevent him from asserting in any other way, to the deterrence of those who might desire to make subsequent appropriations, a right to more water than could reasonably be decreed to them, should his right be adjudicated.

This plan and purpose is deduced from the act as a whole, rather than from any specific provision, but it is sufficiently evidenced by Section 34, as follows:

“Sec. 34.—Every person, association or corporation hereafter intending to appropriate any of the public waters of the State of Wyoming shall, before commencing the construction, enlargement or extension of any distributing works, or performing any work in connection with said appropriation, make an application to the president of the board of control for a permit to make such appropriation. Said application shall set forth the name and post office address of applicants, the source from which said appropriation shall be made, the amount thereof as near as may be, the location and character of any

proposed work in connection therewith, and the time required for their completion, said time to embrace the period required for construction of ditches thereon, and the time at which the application of water for beneficial purposes shall be made, which said time shall be limited to that required for the completion of work when prosecuted with due diligence, the purpose to which the water is applied, and if for irrigation, a description of the lands to be irrigated thereby; and any additional facts which may be required by the board of control. On receipt of this application, which shall be of a form prescribed by the board of control, and to be furnished by the state engineer without cost to the applicant, it shall be the duty of the state engineer to make a record of the receipt of said application, and to cause the same to be recorded in his office, and to make a careful examination of said application, to ascertain whether it sets forth all the facts necessary to enable the board of control to determine the nature and amount of the proposed appropriation. If, upon such examination, the application shall be found in any way defective, it shall be the duty of the state engineer to return the same to the applicant for correction. If there is unappropriated water in the source of supply named in the application, and if such appropriation is not otherwise detrimental to the public welfare, the state engineer shall approve the same by endorsement thereon, and shall make a record of such endorsement in some proper manner in his office, and return the same so endorsed to the applicant, who shall, on receipt thereof, be author-

ized to proceed with such work and to take such measures as may be necessary to protect such appropriation. If there is no unappropriated water in the source of supply, or if, in the judgment of the state engineer, such appropriation is detrimental to public interests, the state engineer shall refuse such appropriation, and the party making such application shall not prosecute such work, so long as such refusal shall continue in force; and *Provided, however*, That the state engineer may, upon examination of such application, endorse it approved for a less amount of water than the amount stated in the application, and for a less period of time for perfecting the proposed appropriation than that named in the application, and *Provided, further*, That an applicant feeling himself aggrieved by any endorsement made by the state engineer upon his application, may in writing, in an informal manner and without pleadings of any character, appeal to the board of control, and if he shall deem himself aggrieved by the order made by the board of control with reference to his application, he may take an appeal therefrom to the district court of the county in which shall be situated the point upon the proposed source of supply at which the diversion of the proposed appropriation is to be made. Such an appeal shall be perfected when the applicant shall have filed in the office of the clerk of such district court a copy of the order appealed from, certified by the secretary of the board of control, as a true copy, together with a petition to such court, setting forth appellant's reason for appeal. Such appeal shall

be heard and determined upon such competent proofs as shall be adduced by applicant, and such like proofs as shall be adduced by the board of control, or some person duly authorized in its behalf."

Laws of Wyoming, 1890-91, pages 100-101.

That this method of acquiring a water right is exclusive seems to be the view of the Wyoming court.

Whalon vs. North Platte, 71 Pac. 995-998.

There can be no pretense of any compliance on the part of the intervenor, and it is impossible to conceive of his having a water right in Wyoming. According to his own testimony he commenced work on the ditch in August, 1890,

Transcript, page 280,

but did not use any water through the ditch until the next year.

Transcript, page 295.

The notice which he filed states that water was first run through the ditch August 4, 1891.

Transcript, page 304.

The intervenor had not effected appropriation until he actually applied the water through his ditch to the beneficial use for which he made the diversion.

Long on Irrigation, 47;

(3) Farnham on Waters, 668.

Until that time his right was inchoate.

Smyth vs. Neal, 49 Pac. 850.

It was like an inchoate right of dower, subject to legislative control.

Randall vs. Krieger, 23 Wall. 137.

IX.

POINT OF DIVERSION.

Complainant and intervenor fail to allege and prove that they made their appropriations on the public domain, or that they acquired the right to make their appropriation from some riparian owner. Such allegations and proof are absolutely essential, and complainant and intervenor's case must necessarily fail.

Smith vs. Denniff, 24 Mont. 20; 60 Pac. 398;

Cave vs. Tyler, 65 Pac. 1089;

City of Santa Cruz vs. Enright, 30 Pac. 197;

Gould vs. Eaton, 49, Pac. 577.

In Smith vs. Denniff the Court said :

“But this privilege or right to appropriate the water of a stream can in any and every case be taken advantage of or exercised only by one who has riparian rights, either as owner of the riparian land, or through a grant of the riparian owner.”

As complainant and intervenor's points of diversion are not situated on their lands, they must show that they have exercised this right on public domain, or state lands, or obtained the right of diversion of the owner of the soil where they make the diversion.

In Cave vs. Taylor, the court said:

“The burden of showing the diversion was made on the public domain was upon respondents, if that fact was essential to respondent's asserted rights under the laws of Congress, as we think it was.”

The contention based on these authorities was met below by the suggestion that both the California and the Montana cases, or at least Smith vs. Denniff among the latter, recognize riparian rights, and that, accordingly,

it is logical for the courts of those states to hold that the riparian rights must be shown to have been extinguished, either by showing that the appropriation was made on the public domain, when that result would be accomplished by the Act of 1866, or by grant from the riparian proprietors; but that, as riparian rights are not recognized in Wyoming, the authorities are inapplicable. The argument is sound if, indeed, *Smith vs. Denniff* does hold, as counsel seem to doubt, that riparian rights exist in Montana. But if we reach the conclusion that this proof is unnecessary, because there are no riparian rights in Wyoming, we must reach the conclusion that *Cruse vs. McCauley* was decided wrongly, and that *Howell vs. Johnson* proceeded upon an erroneous basis, that there are riparian rights in Wyoming, or are not, just as the laws of Wyoming say, that that state has the absolute right to say what rights either appropriators or riparian owners have in the streams flowing through it; in other words, that it owns the waters within it.

Either one or the other theory must be adopted and adhered to. The state does not own the waters, they belong to the general government or to private owners, in which case the proof must show an appropriation on the public domain, or by leave of the private owner, or the allegation is not necessary because the state owns the water and compliance with its laws is all that is requisite to show title. The appellees cannot have the benefit of both theories.

RESUME.

The decree as to the intervenor should be reversed:

- 1.—Because the court had no jurisdiction to adjudicate his rights against the defendants, diversity of cit.

izenship being wanting.

2.—Because he never made an appropriation, or was granted leave to appropriate water in the State of Wyoming as required by its laws, and hence never made any appropriation.

3.—Because whatever right he did have is barred by the statute of limitations, and by the statute of non-user.

4.—Because his unexcused laches forbids the granting to him of any relief in equity.

5.—Because as to the quantity awarded to him, it is unsupported by any pleading.

6.—Because the quantity of water awarded to him is uncertain, indeterminate and measured by a standard unknown to the laws of Wyoming.

The decree as to complainant should be reversed:

1.—Because by consenting to the intervenor's becoming with him a party plaintiff, the jurisdiction of the court was lost.

2.—Because whatever right he may have had is barred by the statute of non-user

3.—Because his laches forbids to him any remedy in equity.

4.—Because he never effected an appropriation of more than enough water to irrigate 25 acres,—under the evidence, 25 inches.

5.—Because he avers in his bill that he is entitled to, and the decree awards him, a quantity of water measured by a standard unknown to the laws of Wyoming.

6.—Because the quantity of water awarded to him is uncertain and indeterminate.

It should be reversed as to both complainant and intervenor:

1.—Because such rights as they have in the waters of Sage Creek they have by virtue of the laws of the State of Wyoming, and to such waters only as shall be flowing in that stream in the State of Wyoming, gathered in that state or allowed to flow into it by the citizens of Montana from their state.

2.—Because any right they may have in the waters of Sage Creek is necessarily subject to the rights of appellants, settlers on lands within what was the Crow Reservation, at the time of the appropriation of complainant and intervenor, and appropriators of the water of the reservation.

3.—Because the amount in controversy, as shown by the bill, does not exceed \$2,000.00 and the court had no jurisdiction for that reason.

4.—Because the proofs show no appropriation by either of the parties named, on the public land, or on private lands with the consent of the owner.

Respectfully submitted,

GEORGE W. PIERSON and
WALSH & NOLAN,

Solicitors for Appellants.

T. J. WALSH,
Of Counsel.

No. 128

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1910.

J. N. BEAN, W. E. DAINBRIDGE, S. W. BENT, WALLACE BENT and CORBETT BENNETT

W. A. MORRIS and T. E. HOWELL

KNIGHT OF PETITIONERS

GEORGE W. PIERSON,
THOMAS J. WALSH,
CORNELIUS B. NOLAN

Solicitors for Petitioners.

THOMAS J. WALSH,
Of Counsel.

FILED
DEC 12 1910
JAMES H. HICKMAN

No. 122.

IN THE
SUPREME COURT
OF THE
UNITED STATES.

October Term, 1910.

J. N. BEAN, W. R. BAINBRIDGE, S. W. BENT, WAL-
LACE BENT and CORBETT BENNETT,

Petitioners,

vs.

W. A. MORRIS and T. N. HOWELL,

Respondents.

BRIEF OF PETITIONERS.

I.

STATEMENT OF CASE.

This cause is here by virtue of a writ of certiorari addressed to the Circuit Court of Appeals of the Ninth Circuit, to review a judgment of that court affirming a decree of the United States Circuit Court for the District of Montana. The suit in which the decree was entered was brought by the respondent William Morris, a citizen of the State of Wyoming, against the petitioners and others, citizens of the State of Montana, the bill of complaint alleging that the complainant is the owner

of certain lands in the state of his residence and of the right to 250 inches of the waters of Sage Creek for the irrigation of the same, appropriated in the State of Wyoming. He then averred that the defendants named in his bill were diverting, within the State of Montana, within which state the stream named has its source, and in which are its upper courses, the waters thereof and of the tributaries to and upon lands owned by them in the State of Montana, thus depriving him of the use of the same to his damage.

The bill contained an averment to the effect that "the amount in this action exceeds the sum of two thousand dollars, exclusive of interest and costs."

Record, page 2.

But it also averred that the complainant's "water right and appropriation is of the value of two thousand dollars."

Record, page 3.

In another paragraph it was averred that the complainant had suffered damages by the acts complained of in the sum of \$2500,

Record, page 4,

and though the bill averred that the complainant "is entitled to damages" in the sum of \$2000, no prayer was made for any judgment for damages, the relief asked being injunction against the continued diversion of the waters of the stream.

Record, page 4.

In the answer of the petitioners it was denied that the amount involved in the action exceeded \$2000, or that the complainant's alleged water right was of the value of \$2000, or that he had been damaged at all by any acts of the petitioners. They averred that his ditch

would not carry more than 100 inches of water, that he never farmed more than 65 acres of the land mentioned in the bill of complaint, that he had not tilled any of it more than eight years though the bill alleged that he had farmed it for fifteen years, and that no more than forty inches, as measured by the laws of Montana, were required to supply his wants. It was denied that he had made any appropriation in accordance with the laws of either Wyoming or Montana; likewise that he had used the water continuously. On the contrary the petitioners set out that they had severally made appropriations of the waters of Sage Creek and a tributary, Piney Creek, in Montana, for the irrigation of homesteads on which they had respectively settled, and which they were cultivating within that state of which they were citizens; that they had, since the date of their appropriations and for a time longer than the period of the statute of limitations (ten years) in the case of the petitioners Corbett Bennett, S. W. Bent and Wallace Bent, continuously and adversely used the waters of the stream in question for the irrigation of their places, and that relying on their right to use the water, they had placed them under cultivation, and had erected on them valuable improvements, houses, barns and fences, all of which would become valueless if they were deprived of the use of the waters of Sage Creek. They also set out that owing to the character of the bed of the stream above the head of the complainant's ditch, the water flowing therein, though allowed to run freely down the channel, would not reach the lands of the complainant in the dry season, but would lose itself in the sands of the bed. The answer set up the statute of limitations, non-user, abandonment, adverse user, laches and estoppel.

The settlement of Corbett Bennett antedated the survey of his lands, dating, with his appropriation, back to 1892. Similar conditions were averred to exist as to the predecessors of the petitioners, S. W. Bent and Wallace Bent.

Record, pages 11-19.

Before the cause came on for hearing the respondent T. N. Howell was admitted as an intervener, upon a petition alleging that he is a citizen of the State of Wyoming; that he owns lands in that state and a water right acquired by appropriation therein of $6\frac{1}{4}$ cubic feet per second of the value of \$5000, subject, however, to the prior right of the complainant, and making averments as to interference with his right, substantially as did the complainant.

Record, pages 27-31.

The petitioners made answer to the intervener in substance the same as the answer filed by them to the bill,

Record, pages 35-47,

and in particular denied the intervener's allegation of residence in Wyoming, averring, in that connection, that he is, in fact, a citizen and resident of Montana.

Replications were filed and the cause proceeded, the complainant and the intervener joining in the prosecution of the suit against the defendants. Fred H. Hathorn, solicitor for the complainant, filed the bill on his behalf.

Record, page 5,

and James R. Goss signed the petition in intervention as solicitor for Howell, intervener,

Record, page 31,

but these two parties joined in the taking and presentation of the testimony, Messrs. McConnell & McConnell

and James R. Goss acting as solicitors for both of them.

Record, pages 82, 86, 97, 100, 111, 293, 321.

After the admission of Howell as a party, the cause proceeded as though he had united originally with the complainant in the institution of the suit. In all the proceedings for the review of the judgment the complainant and the intervener have acted jointly, appearing by Messrs. McConnell & McConnell as their solicitors and counsel.

The cause, on stipulation of the parties, was referred to a master to take the testimony and make findings of fact and conclusions of law.

Record, page 293.

The master reported, among other things, that the complainant had never complied with the requirements of the laws of the State of Wyoming governing the appropriation of water or the acquisition of water rights therein.

Record, page 57.

Exceptions were taken to his report, and the findings generally approved, except that last above referred to, the court holding that complainant had made a valid appropriation.

The findings as adopted by the court were, briefly reviewed, to the effect that Sage Creek is a natural water course, having its source in the Pryor Mountains, in Carbon County, Montana, and flowing in a general southerly direction across the boundary line into Wyoming, where it empties into the Stinking Water; that in the year 1887 the complainant Morris made an appropriation in Wyoming of the waters of Sage Creek, to the extent of 100 inches, for the irrigation of a tract of 160 acres of land in that state, which he has since pre-

served by continuous use; that the right so acquired by him is of the value of \$3200, and that he has been damaged in the sum of \$2500 by the acts of the defendants complained of, though the evidence not segregating the damage done by any particular defendant, the court held that only nominal damages could be recovered.

Record, pages 73-76.

As to the intervener, Howell, the court made similar findings, awarding him 110 inches of water under an appropriation found to have been made in August, 1890, his right being determined to be of the value of \$3200, and his damages \$2500, though, for like reasons, the court held he could recover only nominal damages.

A finding was made by the court to the effect that the complainant Morris was at the time of the commencement of the suit a citizen of Wyoming.

Record, page 74,

and another, that all the defendants are citizens of Montana,

Record, page 78.

but no finding was made as to the citizenship of the intervener, the court reaching the conclusion that his citizenship is immaterial.

Record, page 79.

On these findings, a decree was entered adjudging the complainant to be the owner of 100 inches of the waters of Sage Creek, miner's measurement, his right to date from April, 1887, and the intervener to be the owner of 110 inches, dating from August, 1890. The decree enjoined the defendants from taking water from the stream in quantity sufficient to interfere with the enjoyment by the complainant and the intervener of the rights awarded them, and the complainant was enjoined

from diverting any of the water of the stream in excess of the quantity awarded him, to the injury of the intervenor.

Record, pages 80-81.

From this decree an appeal was taken to the Circuit Court of Appeals, resulting in its affirmance.

Record, page 329.

These proceedings are brought to review the judgment of that court.

That part of Montana within which are the lands of the petitioners and the head waters of Sage Creek was, at the time of the appropriations found to have been made by the complainant and the intervenor and, until the cession in 1892, a portion of the Crow Indian Reservation.

Record, page 205,

which extended south to the Montana-Wyoming line.

Revision of Indian Treaties, pages 327-328.

EXTENT OF COMPLAINANT'S RIGHT.

The testimony touching the extent of the complainant's water right is important.

The complainant testified to having taken out his ditch; that he kept on increasing his irrigated area until he had, "four or five years ago" (that is by the year 1900 or 1901) 100 acres of alfalfa and grain in cultivation; that his ditch covers 120 acres and that he irrigates 160 acres with it.

Record, pages 110-126.

Passing the contradictions of this statement the evidence is overwhelming that he has never irrigated, at

any time, more than 25 acres. Although many witnesses were called he is not corroborated as to the extent of his irrigated area by any of them. Even the surveyor called by the plaintiff did not commit himself on this point, simply saying that complainant's land *could* be watered by his ditch with laterals constructed from it, and that he saw evidences of irrigation on the place,—the extent of which he significantly omits to say.

Record, pages 91, 96.

On the other hand, the witness Hine made an actual survey of the land under the ditch and found it to be 21 acres and 43 rods, with a small garden patch, in all estimated by him to contain 22 to 23 acres.

Record, pages 189-190.

There is nothing to show that any more of the land has ever been irrigated, except that the witness Godfrey testified that in 1889 complainant had 40 acres under cultivation, and that this increased, but he could not say how much.

Record, pages 145-146.

The witness Martin testified that he thought that the Morris ranch was irrigated in 1899, but he did not say how much.

Record, page 181.

The witness Medhurst testified that only three acres were irrigated in 1885, before Morris came; that there was very little water from '83 to '85, and that the place could not be irrigated to any great extent, because very little water would reach the place.

Record, page 185.

The witness Bean says that 25 acres were under cultivation, and the witness Bennett, both of whom assisted Mr. Hine in making the survey of the Morris place, esti-

mated the amount under cultivation as 20 to 25 acres, with the addition of a small garden. The rest of the 160 acres had not been cultivated, and were covered with grease wood, from a foot high to as high as a person's head; that there are sand dunes there, and it showed no sign of ever having been cultivated.

Record, pages 215, 216.

The witness S. W. Bent stated that perhaps 60 acres might be irrigated, out of the 160, but that only 20 to 25 had actually been irrigated, and that the rest was covered with sage brush.

Record, page 22.

Wallace Bent also testified that that part of Morris' land lying west of the creek has never been cultivated, and is covered only with grease wood and sage brush.

Record, page 230.

CITIZENSHIP OF INTERVENER.

The only testimony in the record touching the citizenship of the intervener Howell is to the effect that at the time his testimony was taken he resided in Billings, Montana, and that he once lived in Fremont County, Wyoming.

Record, page 127.

No attempt was made to show that at the time of filing his petition or at any time since, he resided in Wyoming. The court significantly failed to make any findings as to his citizenship, remarking that jurisdiction depends not on his but the complainant's citizenship.

THE NOTICES OF APPROPRIATION OF RE-

SPONDENTS.

In support of the complainant's right he offered in evidence a statement with endorsements as follows:

“Plaintiff's Exhibit ‘T.’

“In the District Court, Second Judicial District, in and for Johnson County, Wyoming Territory.

State of Claim to Water Right.

Under Chapter 61, Session Laws of 1886, Irrigation, “An act to Regulate the use of Water for Irrigation and for other purposes, and providing for Priority of Rights Thereto.”

By William A. Morris, of the County of Johnson,
Territory of Wyoming.

Owner of the Sage Creek Water Right.

Territory of Montana,

County of Yellowstone,—ss.

William A. Morris, being first duly sworn, according to law, do depose and say that he is a resident of and is located in Johnson County, Wyoming Territory, and he makes his statement of claim to Water Right for the purpose of securing the right to the water of Sage Creek in the said County and Territory heretofore appropriated by him, and for said purpose I do depose and say: The name of said claimant for which said appropriation is claimed is William A. Morris. The name of the owner of said ditch is William A. Morris. The postoffice address of the owner of said ditch Billings, Montana. The headgate of said ditch and water right is located on Sage Creek in Johnson County, Wyoming, about one mile down said creek from where said creek crosses the Wyoming and Montana line. The general course of said ditch is from about northeast to southeast. The name of the natural stream from which the said ditch draws its

supply of water is Sage Creek, a tributary of Stinkwater River, Wyoming. The length of said ditch is three miles. The width of said ditch is (3 1-2) three and 1-2 feet. The depth of said ditch is two and 1-2 feet. The grade of said ditch is 50 feet per mile. The water of said stream was appropriated by William A. Morris, aforesaid, by means of a dam in said creek and ditch therefrom for said William A. Morris by the original construction thereof on the 5th day of May, A. D. 1887.

The amount of water claimed for said ditch is ——— cubic feet per second of time.

The present capacity of said ditch is ——— cubic feet per second of time.

The number of acres of land under said ditch and being and proposed to be irrigated therefrom is six hundred and forty acres, more or less.

W. A. Morris.

Subscribed and sworn to in my presence this 25th day of June, A. D. 1887,

John McGinness,

(Notarial Seal.)

Notary Public.

(Endorsed): Wm. A. Morris. No. 2804. Office of Register of Deeds. County of Johnson.

I hereby certify that the within instrument was filed in this office for record on the 2d day of July, A. D. 1887, at 5 o'clock P. M. and was duly recorded in Book "D," Misc. Rec., page 405. W. A. Evans, Register of Deeds., Deputy. 28-04, Fees pd. 53. No. 666. Morris. Plaintiff's Exhibit "A" to be attached to the deposition of Wm. A. Morris. Filed Aug. 10, 190. Geo. W. Sproule, Clerk."

Transcript, pages 276 to 278.

No evidence of the filing was offered except the endorsement on the statement.

To the introduction of this statement the answering defendants objected on the ground that the same is immaterial and incompetent and does not comply with the laws of either Wyoming or Montana.

The intervener introduced as his notices of appropriation two papers as follows:

“Plaintiff’s Exhibit ‘B.’

“Timber Culture Ditch.

Taken out of Sage Creek a tributary of Stinking Water River, on or near SW 1-4 of the SW 1-4 of Sec. 18, T. 57 N., R. 97 W., running thence 24 degrees E. of S. 88 rods, thence 30 degrees E. of S. 32 R. thence 9 degrees S. of E. 22 R. 4 links, thence 42 degrees E. of S. 24 R. 10 links, thence 12 degrees E. of S., 8 R. thence 12 degrees E. of S. 8 R., thence 12 degrees N. of W. 16 R., thence 45 degrees S. of W. 64 R., thence 25 degrees E. of S. 120 R., thence 31 1-2 degrees E. of S. 147 R. 4 links to the north line of Sec. 30, T. 57 N., R. 97 west. Water was first run through said ditch on August the 4th, 1891.

(Morris vs. Bean et al. Plaintiff’s Exhibit ‘B,’ H. L. W.)”

“Plaintiff’s Exhibit B-2.

The State of Wyoming,
Fremont County.—ss.

This certifies that Josiah Cook, Esq., was a duly elected and fully qualified justice of the peace in and for said county in said state, from the first Monday in January, 1891, to the first Monday in Jany., 1893, that all official acts done by him within said dates is entitled in full faith and credence.

In witness whereof, I have hereunto set my official signature, attested by my official seal, the seal of said county this Nov. 15th, 1893.

J. A. McAvoy.

County Clerk and the proper certifying officer under the laws of Wyoming to the official capacity of Notaries and Justices of the Peace.

(SEAL)

J. A. McAVOY,

County Clerk.

(Plaintiff's Exhibit B-2. H. L. W.)"

"Plaintiff's Exhibit B-3.

Statement of Claim to Water Right.

By T. N. Howell, Owner of the Timber Culture Ditch.
Territory of Wyoming.

County of Fremont.—ss.

I, T. N. Howell, being first duly sworn, do depose and say that I am the owner of the above-named ditch, situated in Water District No. 8, Fremont County, Wyoming Territory, and I make this statement for the purpose of securing the right to the water of Sage Creek heretofore appropriated by me and the right of way for said ditch on the line shown by the accompanying——

1. The name of said ditch is Timber Culture.
2. The name of the owner of said ditch is T. N. Howell.
2. The postoffice address of the owner of said ditch is Lovell, Wyoming.
4. The headgate of said ditch is located on the SW 1-4 of the SW 1-4 of Sec. 18, T. 57 N., R. 97 W.
5. The general course of said ditch is SE, and the line of said ditch is more particularly shown by the accompanying ——.
6. The name of the natural stream from which said ditch draws its supply of water is Sage Creek, a tributary of Stinking Water River.
7. The length of said ditch is one and one-half miles.
8. The width of said ditch is 8 feet at the top and six

feet at the bottom.

9. The depth of said ditch is one foot.
10. The grade of said ditch is one-fourth inch to the rod.
11. The carrying capacity of said ditch is ——cubic feet per second of time.
12. Work was commenced on said ditch August 1st, 1890.
13. Water was appropriated from said ditch for NE. 1-4 of the SE. 1-4 and the SE. 1-4 of the NE. 1-4, and W. 1-2 of the NE. 1-4, S. 20, T. 57 N., R. 97 W.
14. The number of acres of land lying under and being and proposed to be irrigated by water therefrom is 160 acres.

T. N. HOWELL.

Sworn to and subscribed before me this 7th day of Sep., 1891.

JOSIAH COOK,

Justice of the Peace.

(Plaintiff's Exhibit "B-3." H. L. W.)

(Endorsed): Stat. Claim to W. Right by T. N. Howell, taking water from Sage Creek, a tributary of Stinking Water River.

State of Wyoming,

Fremont Co. Clerk's Office,—No. 5184.

Filed in this office for record at 10 o'clock A. M. Oct. 28, 1891, and recorded in Book A. of W. R. in the office of the State Engineer at pages 130 and 131, Miscellaneous Records.

J. A. McAVOY,

County Clerk and Reg. Deeds.

Recorded by State Engineer for Clk. Fremont Co. Wyo. Fees paid.

(Plaintiff's Exhibit "B" to Deposition of T. N. Howell.)"

Transcript, pages 303 to 307.

It seems to have been conceded below that neither the one nor the other of these statements met the requirements of the law of Wyoming at the time the appropriations of those parties respectively were made.

According to the testimony of the intervener, the respondent Howell, he commenced work on his ditch in August, 1890,

Record, page 128,

but did not use any water through it until the next year.

Record, page 135.

The notice which he filed states that water was first run through the ditch August 4, 1891.

Record, page 139.

In this connection it is to be noted that no evidence was submitted as to the ownership of the land at the point of diversion in the case of the appropriation of either of the respondents.

LACHES, ABANDONMENT, NON-USER AND STATUTE OF LIMITATIONS.

The intervenor testifies that he cultivated his land in 1891 and 1892, and raised a splendid crop in 1893; that he put in a big crop in 1894, but that the defendants took the water in June, and the crop dried up. He put in another crop in 1895, but that dried up also, for the same reason, and he raised nothing. He met with the same experience in 1896. Subsequent to that time he never put in any crop. He says, "I had lost three crops,

and I got disgusted with it; it was no use to try it, until I got the water right."

Record, pages 129-131.

His complaint in intervention was filed September 5, 1903.

Record, page 32.

He suffered for want of water even in 1893. On cross-examination he says, "They (the defendants) used water late in the fall of 1893; we run short of water then; I know that, in '93 I saw we were not going to have water enough to cut the oats and I cut it for hay; I would have had to irrigate it again to make oats and we didn't have the water to do it with."

Record, page 137.

The witness Godfrey, called by complainant and intervener, testified that there has not been enough water at the place of either of those parties with which to irrigate since 1893.

Record, page 145.

Another witness called by the same parties, Mr. English, tells that he was at the Howell ranch in the fall of 1893 and that everything was dried up,—no water there,—there was a little at Morris' but not much.

Record, page 154.

The intervener, Howell, called on behalf of the complainant, says the latter had not raised any crops for five or six years, because he has had no water, and that he has been unable to raise any grain since 1894 for want of water: that since 1895 the water begins to fail about June 1, and by July 1 he is out of water for irrigation, and by August even for stock.

Record, page 136.

The complainant himself says that he has been short of

water by reason of its having been taken by defendants ever since 1894.

Record, page 121.

On behalf of the defendants, the witness Hine tells that the head-gate of the Howell ditch is covered up with dirt in the creek bank, filled to the top. He says, "I observed Mr. Howell's land as to showing evidence of cultivation; it showed nothing more than just where the laterals—the laterals are ploughed out, and outside of that there is no evidence of any cultivation being there. The laterals do not show evidence of carrying water at any time. They seem to be just the same as when they were made; the appearance of the land is similar to that above the place, the same as outside of the fence. There isn't any of it that has got any grass on it, or anything to show that anything has been raised on it."

Record, page 190.

It doesn't show that it has ever been irrigated; there is no grass or anything to show it has been irrigated.

Record, page 196.

The defendant Bean says of the place, "I visited Mr. Howell's place, he has something like 100 acres under ditch; I couldn't tell that it had ever been cultivated. I didn't see anything to indicate that a crop had ever been sown on it only there was some furrows ploughed through but it didn't show that there had been any water in them, or had been any crop there; these furrows were some laterals ploughed through the field."

Record, page 207.

The defendant Corbett Bennett says, "I went to Mr. Howell's place at this time. His head gate was made of two inch stuff completely covered over, and the opening next to the creek was two feet long by five and one-half

inches deep. The opening on the ditch side was filled up with rubbish and stuff that had drifted in there and filled it in. We passed over Howell's land; so far as looking at the ground now is concerned, it shows no evidence of ever having been cultivated, he had ditches leading on the land, they showed they had never been used since they were built. Howell had no dam at all in Sage Creek, two posts set on each side of the creek, and some boards put across, evident to back up the water, but they were gone, there had at one time been in, I should judge, a temporary dam."

Record, pages 215-216.

ESTOPPEL.

In connection with the foregoing facts should be considered the undisputed testimony that the lands of all the parties are unproductive, and well nigh valueless without irrigation; that each of the appealing defendants has taken out ditches from either Sage Creek or Piney Creek, and completed their appropriations according to the laws of the State of Montana, that of Bean dating from July 1, 1893,

Record, page 247.

Bainbridge's from August, 1900,

Record, pages 237, 239, 240, 241, 236,

Bert Bent and Wallace Bent from some time in the month of October, 1892, after the 20th,

Record, pages 166, 84, 251, 253-254, 258-262,
and Corbett Bennett from July 3, 1893,

Record, pages 256-260, 248, 102-105; 227-233;
that Bean irrigates 60 acres of alfalfa, timothy, grain,

potatoes, garden and orchard on his place, the orchard consisting of five acres of apples, pear and plum trees.

Record, pages 243, 246;

and that he has on the place other improvements consisting of ditches, fences, corrals, barns and houses of the value of \$2000,

Record, pages 243-248,

that Bainbridge cultivates 30 acres of alfalfa, grain and potatoes, and has improvements on his place, consisting of a house, barns and sheep and horse corrals worth \$1500,

Record, pages 241-242, 236,

that Bert Bent has 150 acres in crop mostly wild hay with some alfalfa and grain; that he has on his place improvements consisting of fence, corrals, sheep sheds, stables, etc., of the value of \$2500,

Record, pages 252-253, 269-270,

that Wallace Bent has 110 acres in crop, timothy, alfalfa, wild grass, grain and potatoes; that he has on his place improvements similar to his brother's worth \$2000,

Record, pages 252, 253, 262,

and that Corbett Bennett irrigates 30 acres of timothy and alfalfa and has similar improvements on his place worth \$2000.

Record. pages 249-250.

SINKING OF WATER IN SAGE CREEK.

A large amount of testimony was submitted on the one side to establish, and the other to refute the contention that in the season of low water the amount of the flow of Sage Creek is so small as that if allowed to run

it would sink in the sands and be unavailable to the complainant or intervener at their respective places.

It appears by the uncontradicted evidence that Sage Creek is a slow stream, very crooked, the bed of which consists of sand or gravel, and that it is about forty miles, following its sinuous course, from the vicinity of the lands of the petitioners to those of the respondent Morris,

Record, pages 192, 214,

and twelve miles more to Howell's.

Record, page 205.

Inasmuch, however, as this feature of the case had the earnest consideration of the trial and the reviewing court, the evidence is not here summarized, nor is the court asked to enter upon the inquiry.

The petitioners, however, ask a review of the record under the following:

II.

SPECIFICATIONS OF ERROR.

I.

It was error in the Court to find or rule that any appropriation made by the complainant or the intervener of the waters of a stream in the State of Wyoming gave to them, or either of them, any priority over any right acquired by the petitioners or any of the defendants, under or by virtue of the laws of the State of Montana, or to the waters of any stream within the State of Montana.

II.

It was error in the Court to find or rule that any appropriation made by the complainant or the intervener of any water within the State of Wyoming, or made under the laws of Wyoming, or any right to the use of the water of any stream in the said State of Wyoming, or

acquired under the laws of Wyoming, or any right to the use of the water of any stream in the said State of Wyoming, or acquired under its laws, furnished any basis before any court sitting in the State of Montana for an injunction against the petitioners, having appropriated and acquired the right to the use of the waters being used by them within the State of Montana, under and by virtue of the laws of the State of Montana.

III.

It was error in the Court to find or rule that the Court had any jurisdiction to enforce, as against citizens of the State of Montana using waters within the State of Montana, of streams within the State of Montana, appropriated under its laws, rights claimed to have been acquired by the respondents to the use in the State of Wyoming of the waters of a stream within the State of Wyoming, acquired under and by virtue of the laws of the State of Wyoming.

IV.

It was error in the Court to hold that the amount in controversy between respondent Morris and petitioners exceeded \$2000.00, or that the court upon the averments of the bill or under the proofs had any jurisdiction of the subject-matter, and it was error to enter any decree herein, for that it appears from the bill of complaint that the amount in controversy does not exceed \$2000, and that, therefore, the Circuit Court had no jurisdiction of the subject-matter of the action.

V.

It was error in the Court not to dismiss the petition of the respondent Howell, and it was error to grant him any relief, for that it appears that the Court had not jurisdiction of the subject matter of his petition or to grant him

any relief, because he has not shown that he is or was at any time a citizen of any state other than the State of Montana, of which the petitioners against whom he seeks and was granted relief are citizens.

VI.

It was error to grant any relief to the respondent Morris, for that the said respondent consenting to the respondent Howell's joining with him in the prosecution of this suit against the petitioners, the respondent Howell appearing to be a citizen of the same state with petitioners, the Court lost jurisdiction and had no power to enter any decree except one of dismissal.

VII.

It was error in the Court to find or rule that any acts of the respondents in the State of Wyoming, while the lands now owned by the petitioners were a part of the Crow Indian Reservation, gave to the said respondents any priority of right to the waters of Sage Creek as against the rights of Indians to the waters of the streams within the said reservation, or as against any person acquiring any of said lands through which any streams of the said reservation might flow, and particularly as against the petitioners acquiring lands within what was the said Crow Indian Reservation, at the time of the alleged appropriations of the said respondents on the opening of said reservation, through which flowed the streams, from making use of the waters of which the decree entered herein enjoins the petitioners.

VIII.

It was error in the Court to hold that any acts of the respondents towards the appropriations of the waters of any stream in the State of Wyoming gave to them any rights as against occupants of lands

within what was formerly the Crow Indian Reservation, as to streams flowing through the same, antedating the time when such lands ceased to be a part of said Crow Indian Reservation.

IX.

It was error in the Court to find that the cause of action of either of the respondents is not barred by the Statute of Limitations.

X.

It was error in the Court to find that either of the respondents is not guilty of such laches as to defeat his right to maintain this action.

XI.

It was error in the Court to find that either of the respondents is not estopped from maintaining this action.

XII.

It was error in the Court to find that either of the respondents has not abandoned any right he ever acquired as against the petitioners to the waters of Sage Creek.

XIII.

It was error in the Court to find or rule that the waters of said Creek, during the irrigating season do not sink in the channel thereof, above the land of either of the respondents, or that a useful quantity of the same would reach the lands of the respondents during the irrigating season, but for the diversion of the same and its tributaries by the petitioners, and to fail to find and rule that the waters of said Creek, during the irrigating season, sink in its bed or channel, so that, though the petitioners diverted none of the same or the waters of the tributaries of the said Sage Creek, a useful quantity thereof would not reach the lands of either of the respondents.

XIV.

It was error in the Court to find that the respondent Morris is entitled to, or to judge to him, more than twenty-five inches, miners' measurement, of water.

XV.

It was error in the Court to award to either of the respondents any number of inches, "miner's measurement" for that in his bill respondent Morris alleges an appropriation of two hundred and fifty inches "statutory measurement," and respondent Howell six and one-fourth cubic feet per second, neither alleging an appropriation of any number of inches "miner's measurement."

XVI.

It was error in the Court to award to either of the respondents any quantity of water measured by miner's inches, for that the standard for the measurement of water in the State of Wyoming is a cubic foot of water per second, and because a miner's inch is an uncertain and indeterminate quantity.

XVII.

It was error in the Court to hold that respondent Howell acquired a water right, notwithstanding he failed to comply with the laws of Wyoming by filing an application, and obtaining a permit, as required by Section 34 of the Act of the Legislative Assembly of the State of Wyoming, approved December 22nd, 1890.

XVIII.

It was error in the Court to hold it unnecessary for the respondents to make proof that their appropriations, respectively, were made either on the public domain or on private lands, with the consent of the owner of such lands.

XIX.

It was error in the court to hold that the amount in controversy exceeded \$2,000.00.

III.

ARGUMENT.

I.

THE JURISDICTION OF THE CIRCUIT COURT.

The petitioners insist that the decree is erroneous and should be reversed, because

(a) The amount in controversy as shown by the bill of complaint does not exceed \$2000, exclusive of interest and costs.

(b) There is no diversity of citizenship shown by the proof between the respondent Howell and the defendants against whom he prayed and obtained relief.

(a) THE AMOUNT IN CONTROVERSY.

The bill alleges that the amount in controversy exceeds \$2000, exclusive of interest and costs, but whether it does or does not is to be determined from the facts stated. If the just conclusion from those facts is at variance with the mere conclusion of law which the averment referred to,

Fishback v. W. U. Tel. Co., 161 U. S. 96,

it can have no weight. The thing in controversy, as was justly said by the learned district judge, is the respondent Morris' water right. On the value of that right depends the jurisdiction of the court. That right is averred in the bill to be of the value of \$2000.

Record, page 3.

Of course, a controversy involving a right of the value of \$2000 does not fall within the jurisdiction of the United States Circuit Court. The amount involved must exceed \$2000.

It is true the bill avers that the respondent Morris has been damaged in the sum of \$2500 by petitioners' interferences with his water right, but damages in equity can be awarded only as incidental to the main relief. The jurisdiction to award damages is at best a *dependent* jurisdiction. If the court of equity has no jurisdiction over that feature of the controversy, by reason of which alone it is entitled to hear the cause, because the value of the litigated right is not sufficiently large, its jurisdiction cannot be helped out by the amount of damages claimed in consequence of an invasion of that right.

But more. The damages that might be awarded could not by any possibility exceed the value of the property right injured. One cannot recover damages for injury to property in excess of its value.

Lentz vs. Carnegie, 27 Am. St. Rep. 717.

If the respondent Morris were, by proceedings in eminent domain, deprived for all time of his water right his damages, conceding its value as averred in his bill, would be just \$2000. It is apparent, then, that that is the amount in controversy. Accordingly, we insist that the bill shows on its face that the court has no jurisdiction and we submit that the evidence confirms the want of jurisdiction disclosed by the bill.

Undoubtedly in actions "sounding in damages" the amount claimed as damages controls. But this is not an action sounding in damages. It is an action in equity for an injunction, damages being asked as merely incidental relief. It is more nearly like an action to quiet title in which the value of the property is the test.

Simon vs. House, 46 Fed. 317;

Smith vs. Adams, 130 U. S. 167.

"In determining from the face of a pleading

whether the amount really in dispute is sufficient to confer jurisdiction upon a court of the United States, it is settled that if from the nature of the case as stated in the pleadings there could not legally be a judgment for an amount necessary to the jurisdiction, jurisdiction cannot attach even though the damages be laid in the declaration at a larger sum. *Barray v. Edmunds*, 116 U. S. 550, 560; *Wilson v. Danier*, 3 U. S. 3 Dall. 401, 407."

Vance vs. Vanderclock, 170 U. S. 468-472.

"Value Distinguished from Amount—Property Rights Involved.—Where property itself or its title is in litigation, or some question *per se* affecting its enjoyment and possession, its value is the real matter in controversy, as distinguished from the claims of the contending parties."

1 Ency. Pl. & Pr., 726.

Besides no case is made by the bill, or by the proof, for that matter, for the recovery of damages, even conceding that in an action to restrain trespasses or enjoin a nuisance damages for past injuries resulting from the wrongs complained of can be recovered. The court from which this cause comes holds that equity has no jurisdiction to grant any such relief in an action of that character.

Norton v. Colusa Parrot M. & S. Co., 167 Fed. 202

But it is undeniable that there can be no joint recovery of damages against a number of parties diverting water from a stream unless they act jointly in the diversion. If each acts separately or if any one acts without the consent of the others, he is responsible only for the damage which he occasions; not for any that may arise by their acts.

The bill simply charges an aggregate damage by the acts of all the defendants in the sum of \$2500, and conse-

quently states no cause of action for the recovery of any sum from any defendant. And no effort was made in the proof to show what damage, if any, was done by any particular defendant. Wherefore, the court refused to award any damages and the decree grants the equitable relief of injunction only.

It is true the learned trial judge said in the opinion filed by him that by reason of the state of the proof as adverted to the complainant could have nominal damages only. But nominal damages are as unjustifiable as substantial damages. There is no justification for awarding a judgment for damages in the sum of one dollar against all or any of the defendants any more than there is of \$2500.

He recognized that the claim for damages in the bill afforded no basis for the jurisdiction of the court that the value of the complainant's water right was what controlled, and that the averment of the bill in that regard was insufficient to confer jurisdiction on the court. He suggested an amendment to make the pleading conform to the proof in that regard.

Record, page 302.

But no application to amend was ever made nor was any order ever entered.

It is elementary that in a suit in equity originally begun in the United States Circuit Court the bill must disclose a case within the jurisdiction of the court.

Metcalf v. City of Watertown, 128 U. S. 586.

"When it is properly before the court the bill will be examined as required by the act of congress, 1888, and if the jurisdictional facts do not affirmatively appear in the record, the bill will be dismissed."

Bates Fed. Rep. Proc. 11.

It is most respectfully insisted that the proof elsewhere herein reviewed shows to demonstration and without substantial conflict that the complainant never did effect an appropriation of more than twenty-five inches of water, under any theory of the law, and that an application, had it been made to the court of first instance, to amend by averring such right to be of a value in excess of \$2000 ought to be denied as palpably contrary to the facts as established by the evidence. The bill shows a want of jurisdiction in the court over the subject matter for which reason the judgment must be reversed.

It need not be said that the finding of the court to the effect that the complainant's water right is of the value of \$3200 (made on a basis of a right of 100 inches) is of no avail to support the decree. Whatever the proof or findings may be, the decree must be supported by the pleadings, or it cannot stand.

(b) THE CITIZENSHIP OF THE INTERVENER.

It is conceded that the intervener, Howell, is a citizen of Montana. He resides at Billings, in that state. No attempt was made to show that at the time of filing his petition, or at any time since, he resided in Wyoming.

The decree, so far as it awards him any rights, cannot stand. It is sought to justify it on the ground that the jurisdiction of the court being invoked by complainant Morris, Howell had a right to intervene, and have his rights adjudicated, even though he should be a citizen of Montana.

This was the view taken by both the master and the trial judge.

Record, pages 79, 60.

To this proposition we most respectfully dissent. It is conceded that when, by virtue of any action, property

is brought before the Federal Court of Chancery, which is to be disposed of in the action, any person claiming an interest in the property may be made a party without regard to citizenship. Thus, in an action to foreclose a mortgage, judgment creditors or holders of mechanics' lien may be admitted as parties, for the purpose of establishing their rights, without reference to their citizenship.

Lilenthal vs. McCormick, 117 Fed. 89.

So in admiralty, which usually proceeds *in rem*, any one claiming a lien upon, or interest in the property in litigation, may come in.

It is plain from

Rouse vs. Letcher, 156 U. S. 47,

that to warrant an intervention without respect to the citizenship of the intervener, the property that is the subject of the action must be *in custodia legis*. But there is no property before the Court in this case. There can be none. The property which was made the subject of the bill of complaint—complainant Morris' water right—is not in Montana, but in Wyoming, beyond the jurisdiction of the court. The jurisdiction to proceed at all in this case can be maintained only on the theory that it is a purely personal action.

The Circuit Court for the District of Montana cannot adjudicate on water rights in the State of Wyoming.

Conant vs. Deep Creek Co., 66 Pac. 188.

But, finding within its jurisdiction one who threatens to do the complainant a wrong with reference to property beyond its jurisdiction, a court of equity will bring his person before it, and restrain him from doing that wrong. This case proceeds upon the theory of

Penn vs. Lord Baltimore, 1 Ves. 444. and

Massey vs. Watts, 6 Cranch. 148.

(See Notes to Penn vs. Lord Baltimore, in

II. Leading Cases in Equity, 1817)

namely, that it is a personal action.

The appearance here of the intervener can offer no jurisdiction on the court over any controversy between him and these defendants.

“The Circuit Court cannot take jurisdiction of an intervention in a merely personal action in which no fund has come into the possession of the Court by one who is a citizen of the same state as the party against whom his complaint is directed.”

Seligman vs. City of Santa Rosa, 81 Fed. 524.

In that case Judge Morrow referred to the case of

United Electric Co. vs. La. Electric Co., 68 Fed. 673,

in which one of the propositions determined is thus expressed in the syllabus:

“Where jurisdiction rests upon the diverse citizenship of complainant and defendant, and during the proceedings, a third party, who is a citizen of the same state with defendant, intervenes, the court will have no jurisdiction of his controversy with defendant, unless the controversy between complainant and defendant is one which draws to the court the possession and control of defendant’s property, in which the intervener claims some interest.”

The authorities from this and other courts declaring in general terms that an intervention may be permitted without reference to the citizenship of the intervener are reviewed by Judge Wellborn in

Newton v. Gage, 155 Fed. 598.

and are there shown to be in harmony with the rule that

“The bringing in of a new party in a suit in a federal court by cross-bill or otherwise, when the pres-

ence of such party as an original defendant would have defeated federal jurisdiction, violates both the constitutional and statutory requirement as to diverse citizenship, and the court is without jurisdiction to entertain a cross-bill by an intervener who could not have been made a party to the original bill, unless such intervener represents an interest already before the court or claims an interest in property of which the court holds possession."

Howell had no right to intervene in this action, and the order permitting him to do so was erroneous.

And, the complainant having voluntarily assented to his intervening, the jurisdiction of the court was destroyed.

Forest Oil Co. vs. Crawford, 101 Fed. 849.

In that case, the plaintiff, claiming an undivided interest in certain lands, brought his action to quiet his title, alleging diverse citizenship. Afterwards other citizens of the same state with the defendant were permitted to intervene, and establish with plaintiff their joint claim against the defendant. The Circuit Court of Appeals for the Third Circuit held the jurisdiction failed, saying:

"We cannot shut our eyes to the quite apparent fact that he voluntarily assented to the irregular proceedings by which his bill, even if otherwise maintainable, was made fatally defective by the misjoinder therein of others as his co-plaintiffs. He seems to have been entirely satisfied to have the interposing parties united with himself, to assert with them a joint claim, and to recover with them a joint judgment; and he should not, we think, be now relieved from the consequences of his association."

Forest Oil Co. vs. Crawford, 101 Fed. 852.

Although this is not a joint judgment, nor do the intervener and complainant prosecute a joint claim, still had they united in the first instance, as they might very properly have done, to assert jointly their several claims and to obtain a judgment requiring the defendants to allow to flow down the stream the sum of 110 inches and 100 inches of water, there could be no doubt that the court would be powerless to proceed for want of jurisdiction.

The court very properly held that it had no jurisdiction to adjudicate the rights of the defendants as against each other,

Record, page 79.

But unless the intervener is a citizen of some state other than Montana, it had as much right to do so as it has to adjudicate the rights of the intervener as against the defendants. The ruling which was made amounts to this—that had the complainant made Howell a defendant, and had Howell in his answer or in a cross-bill asserted his rights against all the other defendants, as he has done in his petition in intervention, the Court could not adjudicate them; but since he comes in as an intervener, it may. Or had the complainant omitted to make one of the defendants parties, he might intervene, and get a decree adjudicating his rights, as against all the defendants, relief denied to him by reason of the fact that he is a citizen of the same state with the other defendants.

No authority is necessary to establish that when a fund is in court, even in a Federal Court, the parties are made defendants who claim an interest in it, their rights as against each other are properly adjudicated in the action.

II.

ORIGIN OF A WATER RIGHT.—THE NATION OR THE STATE?

But if the jurisdiction of the court be sustained, a question of first importance in this case is as to whether the complainant or the intervener has any water right that he can assert in any court in Montana, seeing that the only right he claims originates by reason of his diversion in the State of Wyoming of the waters of a stream coming into that state from the State of Montana, within which state the defendants are making the diversions complained of from the same stream and its tributaries, under appropriations made pursuant to its laws.

Complainant and intervener claim to be citizens of Wyoming. Defendants against whom the decree appealed from is awarded are citizens of Montana.

The solution of the question requires an investigation of the true basis of a water right,—that is, a right to divert the water of a stream to the exhaustion of the same if necessary,—whether it originates in a grant from the general government of property belonging to the nation, or whether it is founded upon a grant from the state of a property right of which the state has the lawful disposition.

The federal courts have uniformly held that the general government owns the waters of the innavigable streams flowing over the public lands as a part or an incident of the same, that the right to appropriate the water of such streams comes from the general government and that, as a logical consequence, state lines are immaterial in the determination of relative rights.

The people of the strictly arid states, speaking through

their constitutional conventions, their legislatures and their courts, deny the claim of ownership or right of disposition on the part of the general government in the water of any streams flowing through their territory, and maintain that such waters belong to the states, respectively, with the right to say who may use and enjoy them and to prescribe the conditions under which the right to their use may be acquired.

The theory of national ownership is asserted and the decree in this case justified in

Howell v. Johnson, 89 Fed. 556, and in

Morris v. Bean, 123 Fed. 618,

in which the opinions were written by Judge Knowles of the District Court of Montana; in

Hoge v. Eaton, 135 Fed. 411,

a ruling by Judge Hallett of the District of Colorado; in

Anderson v. Bassman, 140 Fed. 14,

a decision by Judge Morrow sitting in the Circuit Court for the District of Colorado; in

Morris v. Bean, 146 Fed. 423,

in which the opinion was written by Judge Whitson, sitting at the hearing of the court of first instance in this cause; and in the two cases which have come to this court from the Circuit Court of Appeals for the Ninth Circuit,

Rickey L. & C. Co. v. Miller and Lux, 152 Fed. 11, and the present one,

Bean v. Morris, 159 Fed. 651.

An examination of the opinions filed in these several cases will disclose that they all, save Hoge v. Eaton, rest upon the reasoning of Judge Knowles in

Howell v. Johnson, 89 Fed. 556.

That case was really the same one now before the court. The Howell mentioned in the title is the inter-

vener in this suit, and the right asserted in that action is the one decreed to him in this. He obtained a decree against Johnson and others, but the Circuit Court of Appeals held it void for uncertainty in

In re Huntley, 85 Fed. 889.

The opinions reported in 123 Fed. and 159 Fed. were filed in different stages of the present litigation. The views of Judge Knowles expressed in *Howell v. Johnson* were accepted by Judge Morrow in *Anderson v. Bassman* and Judge Hallett hardly more than expresses his conviction as to the question involved in *Hoge v. Eaton*, and refers to *Howell v. Johnson*. Though Judge Whitson gives us the benefit of some discussion of the subject in his opinion on which the decree is based,

Morris v. Bean, 146 Fed. 423,

it is evident that the earlier rulings of Judge Knowles had a preponderating influence with him, as they, of right should have, not only because they, in a sense, declared the law of the case, but because of the just fame of that learned jurist in respect particularly to those branches of the law involved in the case.

So, it may, in perfect justice be said that the Circuit Court of Appeals for the Ninth Circuit, in both of the cases coming before it, adopted the conclusion as well as the line of argument of Judge Knowles in *Howell v. Johnson* without adding to the discussion.

We must go back, then, to that opinion to ascertain the course of reasoning upon which rests the conclusion that a claimant of a water right in one state may go into the courts of another, in which are the head waters of the stream from which he diverts, and ask it successfully to enjoin its citizens from using the waters of that stream therein, upon the claim of a prior appropriation in the

state from which he comes.

Meeting the contention here made by the petitioners, the learned jurist who wrote the opinion in *Howell v. Johnson* said therein:

“It is urged that in some way the state of Montana has some right in these waters in Sage Creek or some control over the same. It never purchased them. It never owned them. * * * In that case (*St. Anthony Falls Water-Power Co. v. Board of Water Com'rs of St. Paul*, 18 Sup. Ct. 157) it was not held, nor was it held in any of the cases cited in the decision therein, that the rights of the owner of the land through which any navigable stream flowed, within the boundaries of any state, depended upon the laws of such state, or that the said owners' right to such waters depended upon such laws, as against one who claimed a right to the same under the laws of congress. To so hold would uphold the view that a state might interfere with the primary disposal of the land of the national government. When a party has obtained title to property from the national government, the state government has no right to destroy that title, except under the power of eminent domain. The state of Montana cannot step in, and say, ‘The right to the water of Sage creek, which the plaintiff acquired under the laws of congress, you can not exercise in this state.’”

Howell vs. Johnson, 89 Fed. 559.

The theory so advanced by the defendants was held to be groundless, at least as to non-navigable waters. Earlier in the opinion the learned judge had traced the foundation of water rights to congressional legislation, to a grant from the general government, not from the state government, his course of reasoning being shown by the following extract from the opinion.

“The national government is the proprietor and

owner of all the land in Wyoming and Montana which it has not sold or granted to some one competent to take and hold the same. Being the owner of these lands, it has the power to sell or dispose of any estate therein or any part thereof. The water in an innavigable stream flowing over the public domain is a part thereof, and the national government can sell or grant the same, or the use thereof, separate from the rest of the estate, under such conditions as may seem to it proper."

Howell vs. Johnson, 89 Fed. 558.

The idea is quite clearly expressed by Judge Morrow in *Anderson vs. Bassman*, wherein, after referring at length to the views of Judge Knowles in *Morris vs. Bean*, he says:

"It is further urged that, as the complainant had obtained his rights from the state of Wyoming by appropriating the water in accordance with its laws, his rights depended upon such laws, and were governed thereby. But the court very clearly explained that the rights of the complainant did not rest upon the laws of Wyoming, but upon the laws of Congress; that the legislative enactment of Wyoming was only a condition which brought the law of Congress into force."

Anderson vs. Bassman, 140 Fed. 14.

Now the state of Wyoming denies that the right to the use of the waters of that state by appropriation rests upon any congressional grant; it denies that the waters of that state belonged to the general government except as trustee for the state, and it asserts that the state and the state alone is the fountain and source from which springs any right whatever to the use of the flowing streams within its borders.

Its views are elaborated in a number of decisions of its

highest judicial tribunal and are enforced with a wealth of learning and cogency of reasoning that would command respect, even though the respondents were not citizens of that state, and required to look to it for such rights as they may have to the waters of Sage Creek.

The opinion in the case of

Farm Investment Co. vs. Carpenter, 61 Pac.
258,

sets forth most fully, perhaps, the theory of the Wyoming court. Therein reference is made to the following provisions of the constitution of that state:

“ ‘Water being essential to industrial prosperity, of limited amount, and easy of diversion from its natural channels, its control must be in the state, which, in providing for its use, shall equally guard all the various interests involved.’ Article 1, Sec. 31. ‘The waters of all natural streams, springs, lakes, or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state.’ Article 8, Sec. 1. ‘There shall be constituted a board of control to be composed of the state engineer, and superintendents of the water divisions: which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the state and for their appropriation, distribution and diversion, and of the various officers connected therewith. Its decisions to be subject to review by the courts of the state.’ Id. Sec. 2. ‘Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests.’ Id. Sec. 3. ‘The legislature shall by law divide the state into four (4) water divisions, and provide for the appointment of superintendents thereof.’ Id. Sec. 4. ‘There shall be a state engineer who shall be appointed by the governor of

the state and confirmed by the senate; he shall hold his office for the term of six (6) years or until his successor shall have been appointed and shall have qualified. He shall be president of the board of control, and shall have general supervision of the waters of the state and of the officers connected with its distribution. No person shall be appointed to this position who has not such theoretical knowledge and such practical experience and skill as shall fit him for the position.' *Id.* Sec. 5."

The provision that "The waters of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state are hereby declared to be the property of the state" is held to be merely declaratory of an existing right, as of necessity it must be. If these waters did not belong to the state, but were owned by the general government or by private individuals the recital in the Wyoming constitution would be an evident attempt at confiscation.

The court, accordingly, defends this declaration in the following language:

"At the outset, however, it is strenuously insisted that the declaration contained in the constitution, that the waters of the natural streams, etc., are the property of the state, is meaningless and of no force and effect. It is argued that the state no more than an individual can acquire property by a mere assertion of ownership, and that the United States, as the primary owner of the soil, is also primarily possessed of title to the waters of the streams flowing across the public lands. This contention demands more than a passing notice. * * * Under the doctrine of prior appropriation, it would seem essential that the property in waters affected by that doctrine should reside in the public, rather than constitute an incident to the ownership of the adjacent lands. Such

waters are, we think, generally regarded as public in character. By the civil law the waters of all natural streams were *publici juris*, and, according to Bracton, that was the rule anciently in England. Kin Irr. Sec. 53; Gould, Waters, Sec. 6. At the modern common law, public waters are generally confined to those which are navigable, and public rights therein to navigation and fishery, and privileges incident thereto. In the arid region of this country another public use has been recognized by custom and laws, and sanctioned by the courts,—a public use sufficient to support the exercise of the power of eminent domain. *Irrigation Dist. v. Bradley*, 164 U. S. 112, 160, 17 Sup. Ct. 56, 41 L. Ed. 369. This use and the doctrine supporting it are founded upon the necessities growing out of natural conditions, and are absolutely essential to the development of the material resources of the country. Any other rule would offer an effectual obstacle to the settlement and growth of this region, and render the lands incapable of continued successful cultivation. The waters for the reclamation of the desert lands must be obtained, in a very large measure, from the natural streams and other natural bodies of water. The common-law doctrine of riparian rights relating to the use of the water of natural streams and other natural bodies of water not prevailing, but the opposite thereof, and one inconsistent therewith, having been affirmed and asserted by custom, laws, and decisions of courts, and the rule adopted permitting the acquisition of rights by appropriation, the waters affected thereby become, perforce, *publici juris*. It is therefore doubtful whether an express constitutional or statutory declaration is required in the first place to render them public. In a country where doctrine of prior appropriation has at all times been recognized and maintained, an expression by constitution or statute that the waters subject to appropriation are public.

or the property of the public, would seem rather to declare and confirm a principle already existing, than to announce a new one. But, however, this may be, we entertain no doubt of the power of the people in their organic law, when existing vested rights are not unconstitutionally interfered with, to declare the waters of all natural streams and other natural bodies of water to be the property of the public or of the state. Nor do we doubt that the legislature may make a like declaration, when in that particular unrestrained by the constitution. If any consent of the general government was primarily requisite to the inception of the rule of prior appropriation, that consent is to be found in several enactments by congress, beginning with the act of July 26, 1866, and including the desert land act of March 3, 1877."

It invites attention to a similar legislative declaration in Arizona and Nevada and to the fact that the people of Colorado made a similar assertion through their constitution in reference to which the supreme court of that state said in

Wheeler vs. Irrigation Co., 10 Col. 582, 17 Pac. 487:

"Our constitution declares all unappropriated water in the natural streams of the state to the use of the people, the ownership thereof being vested in the public. We shall presently see that after appropriation the title to this water, save, perhaps, as to the consumer's ditch or lateral remains in the general-public, while the paramount right to its use, unless forfeited, continues in the appropriator."

And in

Ft. Morgan L. & C. Co. vs. South Platte Co., 18 Col. 1, 30 Pac. 1032.

"Under our constitution, the water of every natural stream in this state is deemed to be the property

of the public. Private ownership of water in the natural streams is not recognized. The right to divert water therefrom and apply the same to beneficial uses is, however, expressly guaranteed. By such diversion and use a priority of right to the use of the water may be acquired."

Reference is then made to the well-known decisions of the Supreme Court of the United States holding that the tide waters and the waters of navigable streams are the property of the state, a proposition assented to by Judge Knowles in *Howell vs. Johnson*, and the conclusion is reached that in the arid states where water, in the language of the Wyoming constitution, is "essential to industrial prosperity," the proprietorship of all waters is in "the state, as representative of the public or people."

A similar declaration as to the state's ownership of the waters within it is made in the constitution of North Dakota.

North Dakota Const., Art. 17, Sec. 210.

A most instructive consideration of this subject and the conflicting opinions of courts touching it will be found in

1 Farnham on Waters, 135 to 136a.

and in

2 Farnham on Waters, 649 to 652.

Results widely different and of great moment follow from the adoption of the one or the other theory of the origin of water rights,—whether they emanate from the state or exist by reason of a grant from the general government.

If the general government owns the water on the public domain as an incident of its ownership of the public land as asserted by Judge Knowles in *Howell vs. Johnson*, it may grant the right to the water separate and

apart from the land. It is argued from the premise of its ownership of the waters that the acts of 1866 and 1890 operate to convey to an appropriator title to so much of the waters of a stream as he may appropriate, but that if the government has theretofore granted to any one land bordering on or traversed by the stream, it has already granted to such person as an incident to his grant of land, riparian rights in the stream, to which the right of the subsequent appropriator is subject. If the grant of the riparian lands, by relation or otherwise, antedates the appropriation, the riparian right is paramount; if it is later, by the provisions of the acts of 1870 and 1866, it is subject to the accrued right to the water.

The views expressed by the learned Judge Knowles in reference to the proprietorship of the general government in the waters on the public domain led him in

Cruse vs. McCauley, 96 Fed. 369,
to the conclusion that a pre-emptor whose declaratory statement was filed prior to an appropriation of the waters of a stream flowing through his pre-emption claim, could assert riparian rights as against the appropriator.

This is the doctrine of

Lux vs. Haggin, 69 Cal. 255; 10 Pac. 674,
in which the rule of the civil law, adverted to in *Farm Investment Company vs. Carpenter*, that the title to all waters is in the public, was held not to be in force in California.

See note 10 to

1 *Farnham on Waters*, 136.

Oregon followed the California rule in

Curtis vs. Water Co., 20 Or. 34.

It is likewise the law of Washington.

Benton vs. Johncox, 17 Wash. 277; 49 Pac. 495.

It is asserted in recent exhaustive discussions of the subject by the supreme court of Nebraska.

Meng vs. Coffey, 93 N. W. 713;

Crawford Co. vs. Hathaway, 93 N. W. 781.

It must be the law of North Dakota in view of the decision in

Bigelow vs. Draper, 69 N. W. 570.

It will be observed, however, that all the states from which these decisions come, those of Judge Knowles alone excepted, lie about the border of the arid region. To what extent the opinions of Judge Morrow and Judge Whitson may have been influenced by the doctrine prevailing in their own states, it is, of course, impossible to know.

But when we get into the very heart of the arid region, we find the state courts uniformly refusing to give any assent to the existence of any riparian right whatever. They deny that the grantee of *land* from the government acquired any right whatever in the water flowing through it. Colorado led in the denial to the riparian owner of any rights in the waters of the stream.

Coffin vs. Left Hand Ditch Co., 6 Col. 443, and the rule announced by it became known as the "Colorado doctrine."

Long on Irrigation 6.
in distinction from the rule of

Lux vs. Haggin,
spoken of as the "California doctrine."

Wiley vs. Decker. 73 Pac. 210-214.

Although Nevada originally enforced the riparian right, it no longer recognizes it.

Union M. & M. Co. vs. Dangberg, 81 Fed. 73-94.

Arizona enforced the civil law that waters were public and subject to disposition by the legislature under the law of appropriation, in

Clough vs. Wing, 17 Pac. 453.

The supreme court of Idaho spoke of the "phantom of riparian rights" and denied the existence of such a thing in that state.

Drake vs. Earhart, 23 Pac. 541.

Utah declines to recognize their existence.

Stowell vs. Johnson, 26 Pac. 290.

New Mexico adheres to the same view.

Albuquerque vs. Gutierrez, 61 Pac. 357.

So likewise does Montana as shown by

Fitzpatrick vs. Montgomery, 20 Mont. 181-185, in the opinion in which the court said:

"In all of the states of the union where mining has been at all extensively engaged in, especially in the northwestern states and territories, the question here presented for determination has been a fruitful source of litigation. Under the common law the owner of land through or along which a stream flowed had a right to have it flow in its natural channel, undiminished substantially in quantity, and unpolluted in quality, whether he derived any practical benefit from such stream or not. This doctrine has been departed from, if indeed, it ever was recognized as the rule of law in the gold mining states and territories of the northwestern part of the union, and especially so in the Pacific states and territories. There the right to appropriate water for mining and other useful purposes is as old as the settlement and civilization of such states and territories. The right to appropriate water on the public lands by miners and for other useful purposes was long ago recognized by congress. We think it may be safely said that the right to appropriate water for mining and

other useful purposes is settled as the law in all the mining states of the West. It is certainly the settled rule in this state. (*Atchison vs. Peterson*, 1 Mont. 561; *Gallagher v. Zasey*, 1 Mont. 457.) California, it is true, by a divided court has confined the right to make such appropriation to waters on public lands, holding that the purchaser of lands from the government takes the same with all the common-law riparian rights attached. (*Lux v. Haggin*, 49 Cal. 255, 10 Pac. 674.)

The Oregon Supreme Court, in *Curtis v. Water Co.*, 20 Or. 34, 23 Pac. 808, and 25 Pac. 378, followed the rule announced by the California court. But this restriction is not recognized in Nevada or Colorado, nor in any other of the mining states or territories, that we are aware of. (*Jones v. Adams*, 19 Nev. 78, 6 Pac. 442; *Reno Smelting, M. & R. Works v. Stevenson*, 20 Nev. 269, 21 Pac. 317; *Coffin v. Ditch Co.*, 6 Col. 443; *Golden Canal Co. v. Bright*, 8 Col. 144, 6 Pac. 142)."

Some confusion in opinion as to the law of Montana on this subject has arisen by reason of some remarks made by Mr. Justice Pigott in

Smith vs. Denniff, 24 Mont. 20; 60 Pac. 398.

The supreme court of Wyoming appears to have gained the impression that by this decision the Montana court is committed to the "California doctrine."

Willey vs. Decker, 73 Pac. 210.

And the author of

Long on Irrigation
is similarly in error.

It is clear from the context that the only idea the court intended to convey by the language to which has been attributed this significance is that one may not invade the possession of a riparian proprietor for the purpose

of cutting therein a ditch to effect a diversion of the water of a stream, and thus initiate an appropriation without the consent of the riparian proprietor; that both the general government and the state government have given permission to cut ditches through their lands either to initiate the right or to convey the water to the lands to be irrigated, but that permission must be first had of a private riparian proprietor.

None of the district courts of the State of Montana ever enforced the riparian right and Farnham says it does not exist in the law of that state.

3 Farnham on Waters, 652d.

The learned author last referred to invites attention to the fact that the court in the very case of *Smith vs. Denniff*, *supra*, declared that by reason of a provision of the constitution, the State of Montana "has, by necessary implication, assumed to itself the ownership *sub modo* of the rivers and streams of the state."

The views of the supreme court of Wyoming have been adverted to. With one accord the states of the arid region deny that the grantee of land from the government gets any right to the waters flowing through or along it, and assert that such waters belong to and remain in the state; that the state has the right to say and does say whether those waters shall be enjoyed by the riparian proprietors in accordance with the rule of the common law, or be enjoyed by those who may divert and appropriate them. They declare that the water rights do not originate in grant from the general government by virtue of the act of 1866, but that that act merely, as has been repeatedly declared by the Supreme Court of the United States, recognized pre-existing rights.

Forbes vs. Gracey, 94 U. S. 762;

Jennison vs. Kirk, 98 U. S. 453;

Broder vs. Water Co., 101 U. S. 274.

If it be true that the rights existed before there was any legislation whatever on the subject by Congress, in what did they originate? Clearly in the local law. But neither a state nor any subdivision of the state has any power to dispose of the public lands. That power is vested, by the express provisions of the constitution, in Congress.

The deduction is inevitable that if these rights were in existence prior to the time that Congress acted at all, they must have been derived from some authority other than Congress.

The act of 1866 was simply a formal renunciation on the part of the United States of any claim it or its grantees might have to the continued flow in the stream of water that had been appropriated, assuming that it or they had any such. It was, as disclosed by its very terms, a statute of repose, not of grant. Nor can we imagine, as seems to be intimated in *Howell vs. Johnson*, that by this statute power was delegated to the local legislatures to enact laws looking to the disposition of the waters of the streams on the public domain. If such waters are indeed incident to the lands over which they flow, such a delegation of power to legislate on a subject confided by the constitution exclusively to Congress would be void.

A recent declaration by the Supreme Court of the United States leads clearly to the conclusion that the views so generally entertained as to the origin of water rights in grant from the government, expressed by the learned federal judges in the cases referred to, must be revised. Reference is made to the following from

U. S. vs. Rio Grande Irr. Co., 174 U. S. 690:

“As to every stream within its dominion, a state may change this common-law rule, and permit the appropriation of the flowing waters for such purposes as it deems wise.”

If a state can do this, it must be because it owns the waters and simply permits their use obedient to its laws. If it may take away riparian rights as understood at the common law and give the use of the water to appropriators, it may, when that course seems to it wise, abolish the system of appropriation and invest riparian owners with such rights in the stream as they would enjoy at the common law. If we hold to the theory that the appropriator of water enjoys a grant from the general government, it would be simply confiscation to take it away from him and distribute it among riparian proprietors; and equally, if the riparian proprietor enjoys riparian rights in the stream as an incident of his grant of lands from the government, the legislature is powerless to take that property away from him.

Judge Hallett says in

Mohl vs. Lamar Canal Co., 128 Fed. 776-779, that an appropriator of water enjoys a mere license or privilege to take the water and “has no contract with or grant from the government, federal or state, in respect to his privilege.”

Entertaining, as we have heretofore shown, the theory that the riparian right accrues, as against all subsequent appropriators, in favor of the riparian grantee of the government, it has been held in North Dakota that an act abolishing riparian rights is void as to accrued rights.

Bigelow vs. Draper, 69 N. W. 573.

As all lands in a state, save its own, are held either in private ownership or belong to the government, and the government as a proprietor enjoys exactly the same rights as any other owner, it follows that the state can not abolish the riparian right, according to the reasoning of these decisions, except as to its own lands. Of course, the Supreme Court of the United States contemplated and expressed its view of the validity of legislation of a much more sweeping character.

Rights which one enjoys by reason of his ownership and interest in property, under the laws existing at the time of the acquisition of that interest, cannot (subject, of course, to the police power of the state) be taken away from him by subsequent repeal or amendment of the law, by virtue of which he enjoys such rights.

B. & B. Co. vs. M. O. P. Co., 25 Mont. 41.

It is respectfully urged, accordingly, that, in view of this late declaration of the Federal Supreme Court, and the views repeatedly expressed concerning the act of 1866, the theory advanced by the Supreme Courts of Colorado, Wyoming and Montana, and concurred in by the courts of last resort in the other interior States in the arid region, that the waters within their borders belong to the public, to the state, is correct, and must ultimately be adopted.

It is said, in some of the decisions referred to, that the common law, as it defines the rights of riparian proprietors, is inapplicable to the conditions existing in regions where irrigation is necessary, and therefore that the riparian right does not exist. But if the riparian proprietor does not own the water or the right to use it, who does? There can be but one answer. It belongs to the public, to the state.

That the state owns the navigable waters within its borders and the soil under them is not open to question.

Shively vs. Bowlby, 152 U. S. 1.

On acquiring new territory, the general government becomes invested with the title to such waters and lands, but holds them, not as it holds the general body of the public domain, subject to disposition for the benefit of the general treasury, but in trust for the people of the state or states, which may ultimately be formed out of the new territory, which state or states, on being admitted, have the absolute right of disposition of such lands and waters,

Id. pages 48 and 49.

without any permission from Congress.

And why has the state the title to navigable waters and the soil under them? Plainly because such waters are devoted to a public use as public highways. It is not necessary to go beyond Shively vs. Bowlby, to find an answer to this question.

Now, in the arid regions, irrigation is a public use of importance no less than is navigation in the more humid sections. The great empires now arising in majesty out of the heart of the American Desert, could never have been heard of, as their courts have declared, were it not that their waters have been held devoted to this great public use. The Supreme Court of the United States did not hesitate to say in

Fallbrooke Irrig. Dist. vs. Bradley, 164 U. S.
112-164:

“We have no doubt that the irrigation of really arid lands is a public purpose, and the water thus used is put to a public use.” It is declared to be such by the constitution and statutes of nearly every western state.

Now if the state owns the navigable waters within its borders, because they are devoted to a public use, why does it not equally own the non-navigable waters in those states where they are, and since civilization had its feeble beginnings within their territory, have been devoted to a public use?

In other words, are not the waters of all streams in the arid regions "public waters" and are they not to be regarded as "publici juris" as they were anciently regarded by the common law of England?

This conclusion is arrived at by a course of reasoning even more satisfactory than that just pursued. The petitioners deny that (to use the language of Judge Knowles in *Howell v. Johnson*) "the water in an innavigable stream flowing over the public domain is a part thereof" or that the national government being the owner of the land is, therefore, the owner of the water flowing over it, or that it "can sell or grant the same, or the use thereof, separate from the rest of the estate, under such conditions as may seem to it proper."

They assert as an indisputable proposition that the United States has no right except a proprietary right in the public lands within a state. They have exclusive jurisdiction over limited areas, but those may be omitted from consideration in this discussion. In the general body of the public lands, as the owner thereof, they have just such rights as a private individual would have, were he the owner of them. To that part of Montana lying east of the mountains they acquired title from France by the Louisiana purchase. As the owner of such lands they have exactly the same rights as would a private citizen had he been the grantee of the French republic instead of the nation. Their rights in these

lands are proprietary, not governmental, a distinction made clear by Judge Edmonds in

Gould v. Hudson R. R. Co., 6 N. Y. 540, in which he uses the following language:

“When regarding the rights of the State in respect to lands, we must be not unmindful that it has two interests, one governmental and the other proprietary. Or, as it is divided by M. Prudhom, in his *Traite du Domain Public* (*the public domain*), which is that kind of property which the government holds as mere trustee for the use of the public, such as public highways, navigable rivers, salt springs, etc., and which are not, of course, alienable; and *the domain of the State*, which applies only to things in which the State has the same absolute property as an individual would have in like cases.”

Accordingly, the United States owns the waters of the streams flowing over the public lands as a private individual, did he own these lands, would.

Now the owner of land bordering on an innavigable stream or one owning the land on both sides of the stream and the whole or any part of the bed of the stream does not own the stream or the waters in it, even in those states where the common law doctrine of riparian rights has its full application.

Expressions in plenty, both in the text-books and in the opinions of courts where accuracy was not required or at least observed, can be found to the effect that the owner of lands bordering on an innavigable stream owns to the center thereof, both the soil underneath and the water in it. But there is nowhere recognized any such ownership. Kent's language is

“He (the proprietor of lands on the banks of a river) has no property in the water itself, *but a simple usufruct* while it passes along. *Aqua currit*

et debet currere ut solebat is the language of the law."

III Kent's Commentaries, 439.

"None can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession and that during the time of his possession only. But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it."

Washburn on Easements, 218 (4th Ed. 296).

"The proprietors (riparian) have no property in the flowing water, which is indivisible and not the subject of riparian ownership, but may use it for any purpose to which it can be applied beneficially without material injury to others' rights."

Gould on Water, 204.

"There is no special property or ownership in *running* water. While it remains in the earth intermingled with the soil itself, or while it lies there, or even when upon the surface in a state of inertia, it is the property of him who owns the land; but when it has liberated itself and assumes a distinctive form apart from the soil, and forces itself from the boundaries in which it has been confined and assumes the attributes of a running stream, however small in proportions, or insignificant in the purposes to which it can be applied, it at the same time, loses its character as property, and, like light and air, becomes subject to the reasonable use of every person through whose land it flows but still is the actual property of no one.

"There are rights incident thereto in the owner of the soil which cannot be violated with impunity; rights which are distinct from those enjoyed by the public generally, and which exist not because of any special property in the water, but because of the ownership of the land over and through

which it flows, and the rights that are necessarily created thereby. Every person has a right to have the air that diffuses itself over his land come there in its natural purity and in its usual volume, subject to such reasonable interferences therewith as arise from a reasonable use of it by others. So with water. When it takes a course and settles itself into a natural channel it becomes the right of every person to have it flow over his land in the natural channel, undiminished in quantity and unimpaired in quality, except to the extent that grows out of and is inseparable from a reasonable use of it for the usual and ordinary purposes of life by those above him on the stream."

I Wood on Nuisances, Sec. 332.

The Supreme Court of Ohio having said in

Gavit v. Chambers, 3 Ohio, 497,

that "He who owns the lands upon both banks owns the entire river, subject only to the easement of irrigation, and he who owns the land upon one bank only, owns to the middle of the river, subject to this same easement."

took pains to say in

Pollock v. C. S. B. Co., 56 Oh. St. 655-666, 47 N. E. 582:

"This does not, however, mean that the ownership is an unqualified one, for it is universally conceded that the water of a stream is not the subject of ownership in the ordinary sense. As expressed in *Clancy v. Clifford*, 54 Me. 487, 'The right of property is in the right to use the flow and not in the specific water.' That is, it is but a usufructory right, a right to enjoy that which belongs to another and to draw from it all the advantage it will produce without wasting its substance."

The error of asserting that to the riparian owner

belongs the stream to its center, is clearly elucidated in the opinion in

McCarter v. Hudson Co. W. Co., 65 At. 489,
more particularly to be referred to hereafter.

All that can be asserted, then, of the right of the government under the rules of the common law, with respect to streams flowing through or which border its lands, is that it is entitled to the use of the water as it flows by. Because of its ownership of the land, unless, indeed, it can be maintained that the government has a higher right as a land owner than has a private proprietor.

In this connection attention is especially invited to the language above quoted from Wood on Nuisances, to the effect that however insignificant a running stream may be, it is the actual property of no one, but there are rights incident thereto in the owner of the land over and through which it flows, *because of his ownership of such land*.

Now why does he have such rights and what are they? He has them because they are given to him or recognized to be in him by the law of the state in which such lands lie. It has been repeatedly held that the grantee of lands from the United States has just such rights, by virtue of his ownership, as are accorded by the laws of the state in which the lands lie, to the owners of lands generally. A patent from the general government to lands in one state may carry with it greater or less rights than an identical patent to lands in another state. In Massachusetts it was decided in an early case,

Weston v. Alden, 8 Mass. 136.

that:

“A man owning a close on an ancient brook may lawfully use the water thereof for the purpose of

husbandry, as watering his cattle or irrigating the close; and he may do this, either by dipping water from the brook and pouring it upon his land, or by making sluices for the same purpose; and if the owner of a close below is damaged thereby, it is *damnum absque injuria*."

And this decision was affirmed in

Anthony v. Lapham, 5 Pick. 175-177.

On the other hand it was held in

Evans v. Meriweather, 4 Scam. 492,

that the riparian proprietor "may consume all the water for his domestic purposes, including water for his stock. If he desires to use it for irrigation or manufactures, and there be a lower proprietor to whom its use is essential to supply his natural wants, or for his stock, he must use the water so as to leave enough for such lower proprietor."

If, now, one should obtain a patent from the federal government for lands in a state in which prevails the rule asserted in the Massachusetts case with respect to the right to use water of a stream for irrigation, he would have that right, under his patent. If the land lay in Illinois or in some state recognizing a rule like that asserted in Evans v. Meriweather, he would not.

Lest any misapprehension might arise it should be said that under the doctrine of the Massachusetts case, the owner must connect his sluices with the stream below not being responsible for loss by absorption or evaporation from his ditches. Likewise that the Illinois court holds that though irrigation is not a natural want in Illinois, justifying the taking of water for that purpose, it is in more arid regions.

The conflict in the decisions of the courts of the several states in relation to the acquisition of easements of

light and air by implication from grants or by prescription is well known.

Washburn on Easements, 497-506.

In some states a patent from the government might carry with it an easement of light; in others it would not.

In some states a patent from the government to lands bordered by a navigable stream carries with it to the patentee rights to the middle of the stream; in others, his rights stop at the shore. In Iowa he would hold only to high water mark; in Illinois and Mississippi, he owns the bed of the stream to the middle thereof.

Hardin v. Jordan, 140 U. S. 371.

In the case last cited Mr. Justice Brewer said:

"Beyond all dispute the settled law of this court established by repeated decisions is that the question of how far the title of a riparian owner extends is one of local law. For a determination of that question the statutes of the state and the decisions of its highest court furnish the best and final authority."

This court declared in

St. Anthony v. Board, 168 U. S. 349,

that the property rights of the riparian proprietors are measured by the local law, a proposition more elaborately stated in

Packer v. Bird, 137 U. S. 661,

in the following language:

"Whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants, or the use and enjoyment of the property by the grantee."

The fundamental error of Judge Knowles in *Howell v. Johnson* lay in assuming that because the United States had certain rights in the streams of the State of Iowa, for instance, (which he apparently assumed amounted to the absolute and unqualified ownership thereof) when title to the lands therein was first acquired, it had the same rights in,—the same absolute ownership of the streams in Montana. These views led him to say in

Cruse v. McCauley, 96 Fed. 369-373:

“In the eastern part of Montana, the United States acquired its title to lands by virtue of what is called the ‘Louisiana Purchase.’ There cannot be one rule as to the right to the flow of water over its lands in Montana, and another rule as to its lands in Iowa and Missouri. In these last-named states there can be no doubt of the rule that the national government would be entitled to water which is an incident to its land. As the United States then owns the waters which are an incident to its lands, it can dispose of them from its lands if it chooses.”

It is an irresistible conclusion from the foregoing authority that the rights of the United States in the streams flowing over public lands in Iowa and in Montana may be, as they are, essentially and radically different. And this court so held in

Boquillas L. & C. Co. v. Curtis, 212 U. S. 339, when it declared that a statute adopting the common law “is far from meaning that patentees of a ranch on the San Pedro are to have the same rights as owners of an estate on the Thames.”

It must be conceded that the proprietary rights of the grantee in fee of the government measure the proprietary rights which it had. Its patent grants all the rights it had by virtue of its ownership of the soil, except so

far as the federal statutes limit its operation. If the patentee has riparian rights in a stream, his grantor had them and conveyed them to him; if he has not, it is because the government had none to convey.

The question is, then, not whether the United States owns the streams flowing over the public lands as a part thereof, for it has been demonstrated that neither it nor any riparian proprietor owns the streams, anywhere, but what rights have the United States in such streams by virtue of their ownership of the land over which they flow?

And the answer is plain. They have just such rights as the local laws recognize in the private owners of lands through or along which such streams run. If the local law recognizes the existence of "riparian rights,"—by which is here meant the right of the riparian owner to have the stream continue to flow past or over his land as it was wont to flow,—the United States "own" the streams to just that extent.—no more; if the local law does not recognize the existence of riparian rights as above defined, if it recognizes the right of any one without responsibility to the riparian proprietor to "appropriate" and divert the water of the streams, they "own" the streams in no sense.

Now the local law of neither Wyoming nor Montana never did concede to the owner of lands through or along which an innavigable stream flowed, the right to have the stream continue so to flow as against an appropriator of the same. The courts of these states assert, in common with those of the arid region generally, that because wholly unsuited to the conditions under which settlement and development of the country,—viewed either from the standpoint of its mineral or its

agricultural resources, was possible, those provisions of the common law which insured to the owner of riparian lands the continuous flow of a stream through or along them, never became a part of the local law, nor could he claim any rights by virtue of them. In other words they declare that the grantee of the government, and of necessity the government who was grantor, has no "riparian rights" and never did have any.

If the United States ever did have riparian rights in the streams of the arid states, it is undeniable that one to whom patent was issued for lands prior to the act of 1866 acquired those riparian rights by his grant. Since that time, of course, he took, subject to any accrued water rights. But the decisions in the arid states deny that a patent issued to one prior to 1866 gave to him any "riparian rights" as against an earlier appropriator,—a conclusion that is defensible only on the theory that the government had none such to grant.

Coffin v. Left Hand Dock Co., 6 Col. 443.

If it had any such where did it get them? Whatever view may be taken of the opinions of those courts which hold that the common law doctrine of riparian rights is not in force in the arid states because of the natural conditions, the reasoning of the Supreme Court of Arizona in

Clough v. Wing, 17 Pac. 453, seems irresistible. It contends that the government acquired no such rights in public lands in that territory because the Mexican government had none such to grant under the treaty of Guadalupe Hidalgo, the law of Mexico recognizing no such right in the owner of lands.

Neither did France under the Louisiana Purchase. In the opinion in the case last cited reference is made to

the remark of Lord Denman, in *Mason v. Hill*, 5 Barn & Adol. 1, that under the civil law water was *publici juris* and that by it the "first person who chooses to appropriate a natural stream to a useful purpose has title against the owner of the land below, and may deprive him of the benefit of the natural flow of water."

Apparently, there was some question whether this principle obtained full recognition in the law of France. In a note to Article 42 of the "French Civil Code," by Blackwood Wright, the eminent author says:

"There was up to 1898 a great deal of doubt and difference of opinion as to whether streams which were not navigable, and down which rafts could not be floated, were private property or part of the *domaine public*. The new law of 8th April, 1898, gives the riparian owner half the bed, and makes the water nobody's property, the English theory—allowing at the same time to the riparian owners certain rights of user of the water."

But Ch. J. Reid of the Court of King's Bench for the District of Quebec, declared in

Boissonault v. Oliva, Stuart's Rep. 564, after a review of the law of France in relation to the ownership of waters of streams, that:

"The waters of all rivers whether navigable or not navigable, *being matters of public benefit and public interest*, are vested in the Crown and no man, whether seignior or other, can hold or exercise a right over them, without special grant from the crown."

Thus we return to the argument heretofore advanced that the vital public interest in the water of the unnavigable streams in the arid regions, operates to take them out of the realm of ownership by the general government except in trust for the states eventually to be created, in

the same manner that it holds in trust for such states the waters of navigable streams, as was decided in *Pollard v. Hagan*, and repeatedly since.

The overpowering character of that public interest is exhibited in

Clark v. Nash, 198 U. S. 361,

in which this court held that a statute of Utah, permitting condemnation of the lands of another for an irrigating ditch to be constructed by a private individual for the irrigation of his own lands is valid, the use being a public one.

When it is asserted that the United States does not own the streams flowing over the public lands, it will be understood that it is not meant that its dominion over them is not absolute until statehood; its proprietary right only is questioned. Further, it is conceded that it has the title to such streams but holds it, not by the same right that it holds the lands, but in trust for the people of the state, in accordance with the principle of *Pollard v. Hagan*. Moreover, it is not to be considered that it is denied that either the government or any other riparian proprietor has no interest whatever in the stream flowing over or by his or its lands,—as for instance, the right to cut ice from it, or the right to have it flow unpolluted, or to have it flow in full volume as against one not diverting to a useful purpose under the law of the state. Whatever rights of use appertain to riparian ownership, they are such as are accorded by the local law, the waters themselves being the property of the state.

An article by the author of *Water Rights in the Western States* (Wiel) in

Harvard Law Review,

contends that there can be no ownership of running water any more than there can be of air or fish in the sea, the law of the states in relation to the appropriation of water being defended upon the ground that the state may regulate the taking of that which is the property of no one,—in the same manner that game laws are justified. But though the conclusions of the author are supported by a wealth of learning and research, they seem irreconcilable with the oft repeated declaration of this court that the states own not only the beds of navigable streams, but the waters flowing in them.

The proposition for which the petitioners herein contend, receives powerful support from a recent decision of the Court of Appeals and Errors of the State of New Jersey,

McCarter v. Hudson Co. W. Co., 65 At. 489,
affirmed by this court, on writ of error, in

Hudson Co. Water Co. v. McCarter, 209 U. S.
349.

It asserts that subject to whatever rights the local law accords to the riparian owners, the state owns the streams within its borders and can lawfully prevent the diversion of their waters beyond its borders, though the assent of all riparian owners is obtained. The following is quoted from the opinion:

“Since the exercise of all rights of private ownership, by all riparian owners, still leaves the stream to remain as a running stream, there remains a residuum of common or public ownership that, under our system, rests in the state as a trustee for all the people.”

If the State of New Jersey enjoys such a proprietary right in the waters within its boundaries, so must each

western state, or it would not have been admitted to the Union on an equality with the original states. It was upon this consideration that, notwithstanding its general proprietorship of the lands in the newly acquired western territory, it was held that the general government did not become the owner of lands under tidal and navigable waters, and that a patent from it to such lands would be void.

It is alone upon this theory that the legislation of the western states, prescribing the manner and conditions of the acquisition of a water right, can be justified. If the general government owns the waters of the streams flowing through the public domain, what right has a state to pass laws looking to their disposition? Why must one adhere to the laws of Montana or of Wyoming in the acquisition of a water right in those states, respectively, if the property right to be acquired belongs neither to the one nor to the other, but to the United States? Are all these laws, truly enacted with reference to a subject matter of which the states have no jurisdiction whatever? Not at all. They are legislating with reference to the disposition of their own property and their own rights, and Congress recognized this in the Act of 1866.

The validity of legislation of this character was upheld in

Gutierrez vs. Albuquerque Land & Irrig. Co.,
188 U. S. 545.

Now if the respondents in this case must look to the State of Wyoming for whatever rights they have to the waters of Sage Creek, it follows logically that they have no water right which they can assert in this Court against these defendants. If the State of

Wyoming owns all the waters in that state, it follows, "as the night the day," that the State of Montana owns all the waters in that state; that neither the one nor the other enjoys any priority, and that neither can grant any priority as against the other, or any of its grantees. This theory of the ownership of water rights contemplates that from the beginning the waters were held in trust for the people of the State that was to be, and which eventually became the owner when it came into existence. Montana owns all the waters within its borders, and Wyoming owns all the water within its borders, each being entitled to dispose of them as it sees fit.

If Montana allows any of her waters to flow down into Wyoming, they belong to the latter state, of course. If any one allows tailings to run away from his mill and to be deposited upon the land of another, having at the time no purpose to reclaim them, they become affixed to—a part of—the land on which they lodge.

1 Lindley on Mines, 426.

If Wyoming should allow any of its waters to flow down into Nebraska, they belong to that state.

Montana is under no obligation to give any part of her waters to Wyoming, nor to allow them to flow down into that state, that they may be enjoyed by Wyoming licensees or grantees. When respondents Morris and Howell constructed their diversion works, they are presumed to have known that more or less of the waters they were seeking to appropriate came down from Montana, and that she and her citizens might eventually desire to make use of them. So, if one constructed a cyaniding plant on the lower courses of a stream, and caught tailings coming down, he could not complain if the owner of the mill from which they came decided to change his policy,

and impound them.

This view of the law and of the rights of the states gives no advantage to Montana, nor to any state. What more reasonable rule than that the people of Montana own the waters that fall from the heavens upon their soil and that they are, and of right ought to be, entitled to apply them to any beneficial use they may see fit until they pass beyond the borders of that state? So Wyoming owns all the bounties of the heavens that fall on her fields and mountains, but when she allows them to get away from her into Nebraska or Kansas, she has no means, as she has no right, to reclaim them. Why should the states east or west, as the climate grows more and more humid, claim not only the rain that falls on them, but a part of that which comes to bless their neighbors in the higher and dryer regions?

But if it were a fact that this theory of the law would place the people of Montana at an advantage, that is their good fortune. They may enjoy it themselves, or they may admit their neighbors to share it with them. In

McCready vs. Virginia, 94 U. S. 391, the Court held valid a law of Virginia excluding citizens of other states from planting oysters within tide waters of that state. It was held that, as these waters belonged to the State of Virginia and its people, they might reserve them to their own use, or share them with others, as they saw fit.

But if this view of the rights of the people of Montana should not be accepted, still it can scarcely be asserted, unless the theory of original national ownership is adopted, that one appropriating water in Wyoming has

any more standing in a court of the State of Montana to assert a priority against a citizen of the latter state claiming an appropriation under its laws, than would a citizen of Montana have under similar circumstances, in the courts of Alberta against appropriators in that province.

If citizens of that province who divert the waters of Milk River, for instance, came into the courts of Montana to enjoin diversion from the same stream in that state, what would be the answer? The parties would unquestionably be relegated to such relief as could be afforded through negotiations between the state departments of their country and ours. Indeed negotiations of that character have been pending for some time between the department of state and the dominion government, in view of the work undertaken by the reclamation service, to store water by raising St. Mary's Lake in Montana for use along the lower courses of the Milk River, which stream, rising in that state, flows into Canada and back again into the state in which it has its source.

Inasmuch, however, as Montana and Wyoming can neither negotiate treaties with nor make war upon each other, this court is invested with jurisdiction, under the constitution, to settle differences which would otherwise be the subject of diplomatic regulation, in a suit brought by one against the other, as was done in *Kansas v. Colorado*. There would have been no occasion to bring that action, nor would this court, in all probability, have taken jurisdiction if a citizen of Kansas claiming riparian rights could have gone into the federal court in Colorado and maintained an action like this against the citizen or citizens of that state who diverted the stream to his

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damage. If this action can be maintained, no reason can be advanced why any citizen of Kansas owning lands and claiming riparian rights in that state along the Arkansas River may not now prosecute just such an action as this. There is certainly nothing so sacred about the right of appropriation as to justify the belief that one claiming a right of that character in a stream may enforce his right in a state farther up the stream, while one claiming a right in the same stream as a riparian owner cannot.

Before dismissing this phase of the case reference should be made to the consideration which the question it presents has had from the state courts.

The Supreme Court of Colorado considered a closely related question as to whether water could be diverted and appropriated in Colorado for use on lands in New Mexico, but found it unnecessary to decide the question.

Lamson vs. Vailes, 61 Pac. 231.

The same question involved in the last cited case was presented to the Supreme Court of Wyoming.

Willey vs. Decker, 73 Pac. 210.

That Court, having committed itself unqualifiedly to the rule of state ownership—the “Colorado doctrine”—reaches the conclusion by a course of reasoning difficult to trace, that the courts of that state may enjoin one who, under its laws, diverts water in that state from a stream having its source in Montana, of whose waters defendant made an earlier appropriation in Wyoming, but for use in Montana. It is but just to say that though the question was deemed by the trial judge so important and difficult that he certified it up pursuant to a provision

of the constitution of that state, the Supreme Court itself declares that it did not have the assistance of counsel for the defendant. But one side of the case was argued, and it decided in favor of the party represented.

The question presented could have been readily solved upon a theory in entire harmony with the views of the Court expressed in earlier opinions. It would have been sufficient to say that the State of Montana had not abandoned to the State of Wyoming and its citizens all the water which it allowed to run down the stream in question, but only so much as was in excess of the needs of the plaintiff for use in Montana. The very fact that the Montana citizen was ready with his ditch to take it out, though in Wyoming, to carry it on to lands in Montana, disproved any intention to abandon. It presented simply a question of the right of the Montana claimant to occupy the Wyoming soil with his ditch; or at most, the question of whether the Wyoming law permitted him, a citizen of Montana, to come within the State of Wyoming and carry water through this ditch to lands beyond its borders. That question is clearly determined wholly by the construction of the Wyoming statutes. In fact the Court recognized, in one part of its opinion, that this was the real question in the case. (73 Pac. 222.) But the Court proceeded to the consideration of the case as though it presented the identical question involved in this action, whether an appropriator in Wyoming can come into a court in Montana and enjoin an appropriator in Montana from diverting water from a stream therein for use on lands in Montana.

The views expressed by the Court in

Farms Investment Co. vs. Carpenter, *supra*, are reiterated at considerable length.

The attention of this court has heretofore been invited to the irreconcilability of the position taken by the learned District Judge in *Howell vs. Johnson*, supra, and that assumed by the Wyoming court in the case named,—the one asserting a Federal. and the other a State origin of water rights. On that very difference of opinion, the decision in *Howell vs. Johnson* turned, the counsel for the defendant therein taking the position asserted by the Wyoming court in *Farms Investment Co. vs. Carpenter*; the Court, the other view. Because, the court held, the right to the water came by grant from the general government, not restricted in the disposition of the public lands and their incidents by state lines, a right was acquired by complainant, which he could assert anywhere.

Though the decision in *Howell vs. Johnson* was called to the attention of the Wyoming Court in *Farms Investment Co. vs. Carpenter*, by the brief of counsel (9 Wyo. 113), the Court refused to follow its reasoning, and yet **when** it canvasses, in *Willey vs. Decker*, supra, the **question** it assumed to be involved, it actually based its **conclusion** on the reasoning of *Howell vs. Johnson* and followed that case as its guide, saying:

“The Federal Court sitting in Montana recognized a similar right in the case of a Wyoming appropriator from another stream flowing from Montana into Wyoming, and held that an invasion of his rights by the diversion of water in Montana might be enjoined. *Howell vs. Johnson* (C. C.), 89 Fed. 556. In that case the learned judge said: ‘The idea that there can arise any international water right question in the case of an appropriation of the waters of an unnavigable stream cannot be maintained. The rights to such waters, after the national government has disposed of them, must always be

a question pertaining to private persons.' Some expressions contained in the opinions in that case, in respect to state ownership and control of the waters of unnavigable streams have been supposed destructive of an essential principle in the law of irrigation. It is not necessary that we agree with all the reason given by the Court for the conclusion announced, nor that we assent to all the views expressed in the opinion. We think there can be little question but that it was rightly held that the plaintiff in the case had secured a right by appropriation to the waters of the stream, as against a subsequent appropriator in the other state, which might be protected in the courts of such state against injury by acts occurring therein."

The case is not persuasive for the reason suggested.

Perkins County vs. Graff, 114 Fed, 441,
is referred to in Willey vs. Decker, as shedding some light on the question involved. It is more pertinent to the case there presented than here. It involved the question of the validity of bonds issued to bring water out of a stream in Colorado for the irrigation of lands in Nebraska. It can be seen that, at best, that simply presented the question as to whether such permission was granted by the laws of Colorado, and nothing in the opinion aids us in the solution of the question here involved.

The matter came incidentally before the Court in

Conant vs. Deep Creek Co., 66 Pac. 188,
and, without much attention to the subject, apparently, Howell vs. Johnson was approved.

The question is to be solved, as we submit, by a determination of the question as to whether the right arises by a grant from the general government, or whether the citizen of a state enjoys his appropriation by virtue of the state's ownership of waters within its borders. It is

respectfully submitted, for reasons considered, that the latter theory must be adopted.

III.

THE RIGHTS ACQUIRED IN WYOMING WERE SUBORDINATE TO THE RIGHTS ACQUIRED IN AND ON THE CROW INDIAN RESERVATION IN MONTANA.

But there is a special reason why, even though the principle should not be deemed of universal application, the result to which it leads must be arrived at here. The Crow Indian Reservation, defined by the Treaty of May 7th, 1868, embraced all of the County of Carbon, Montana, its southern boundary being coincident with the southern boundary line of that state.

Revision of Indian Treaties, p. 327.

By the treaty of 1890 the lands occupied and owned by the appellants and watered by them from Sage Creek, as well as the head waters of that stream, were thrown open to settlement. Theretofore, no one was permitted to go within that region to acquire either lands or water rights. The citizens and settlers of Wyoming might occupy the territory right up to the Montana line for a stretch from the 107th Meridian West, to where the Yellowstone River crosses it, a distance of 150 miles, and might, if the contention of the appellant is correct, appropriate every drop of water collected in that vast and now marvelously productive and wealthy region, which should flow southward, leaving it, when it should eventually be open to settlement, a parched and hopeless desert. By what right may the citizens of Wyoming thus claim a priority in these waters over those of Montana? If they may, our state is most grievously burdened by its even now vast Indian Reservations. When

they are eventually opened, as they are now fast being, we may find that citizens of other states have, by virtue of acts done therein, acquired the right to come within our state and appeal to the courts to divest the settlers on them, of the waters taken from the streams that flow through their lands, and have their sources within the newly opened territory.

Fortunately, a recent decision of this Court promises to exempt us from such a calamity. It was held in

Winters v. United States, 207 U. S. 564, that the waters flowing through, or bordering on the Belknap Indian Reservation were reserved for the use of the Indians occupying the Reservation, and were not subject to appropriation.

The same consideration which led the Court to the conclusion at which it arrived in the case forces the conviction that the waters in question in this case were not subject to appropriation until after the opening of the Crow Reservation, and then at least for a reasonable time only by the settlers thereon.

The Government recognizes a kind of property right on the part of the Indians to the waters as well as the lands of the reservation. In *Winters vs. U. S.*, this view is adopted. For many years the policy has been pursued of reducing the area of these reservations upon some consideration flowing to the Indians. Our whole vast state, or the greater portion of it, was at one time one or more Indian reservations.

Winters vs. The United States, *supra*.

It was contemplated many years ago that eventually the lands within the reservations would be thrown open to settlement, and an equivalent given to the Indians. More recent statutes provide for the entry of land so

opened under the homestead law, with a payment, the benefit of which flows to the Indians. Such are the provisions of a late act of Congress again reducing the limits of the Crow Reservation.

Is it possible that citizens of Wyoming, under the sanction of either state or federal legislation, had the right to appropriate to themselves all the waters of the reservation by diversions made in Wyoming so that when they should eventually be thrown open to settlement, the Indians could realize nothing for their lands over and above the trifle at which they would sell for purely grazing purposes?

An act passed by Congress opening the Blackfeet Reservation, applying the law announced in

Winters vs. United States, *supra*, provides for the allotment in severalty to the Indians of lands in the reservation, and the entry of the remainder at a price fixed, the amount realized to become a trust fund for the Indians, and further provides that *not only the Indians but the settlers purchasing*, shall have a prior right to the use of so much water as they may divert for the purpose of irrigation within two years from the opening of the reservation. The priority given to the settlers is given, of course, to increase the salability of the lands. Can it be denied that such a provision in the act of opening the Crow Reservation would have been valid, and that the settlers on the reservation would have had the priority? But if they would it would be because the Wyoming diverters had acquired no right, since if they had acquired a priority right they could not be divested of it by a subsequent act of congress.

As the waters of the Crow Reservation were not subject to appropriation when the respondents claim to have

made their appropriations, they cannot maintain this action. At least a court of equity will not put forth its arm to aid in the enforcement of so inequitable an advantage if, even as a matter of strict legal right, the respondents enjoy it.

The suggestion made by the learned district judge that assuming that the waters were not subject to appropriation prior to the opening of the reservation, the appropriations became effective *eo instanti* upon the accomplishment of that fact, does not meet the case, and nothing in the decisions cited in support of this view seems to sustain it. The waters are for all practical purposes subject to appropriation, if, immediately upon the reservation's being opened, prior appropriations take life as against those made on the land made subject to entry. However diligent settlers on the newly opened lands might be, they could by no possibility secure a priority.

Under the law as announced in the Winters case, the right to the use of water on the reservation belonged to the Indians by virtue of the treaty with them, and passed, on the opening of the reservation, to those who appropriated the lands under the act of Congress making them subject to entry, upon their compliance with the laws of Montana.

IV.

LACHES, ADVERSE USER AND ABANDONMENT.

And if the court ever would give to appropriators such an advantage, it ought not to do it in this case where the evidence shows that the respondents slept on their rights for ten years and more before bringing this action.

It is conceded that as to respondent Howell—in fact he himself tells—that he began to suffer because of the want of water in the fall of the year 1893, the shortage being occasioned by the diversions of the petitioners. His petition was filed September 5, 1903.

The respondent Morris says he has been short of water since 1894 because the petitioners have taken it, and the evidence is undisputed that he has not raised any crops for five or six years. No explanation whatever of this long delay is made; no excuse is offered. No reason is assigned why this suit or some similar action was not begun long ago. The petitioners might very well believe, by reason of this long inactivity and failure to question their rights or to interrupt their acts, that their right to the water was conceded. Assuming it to be, they made expensive improvements by which their lands have become producing farms and orchards. The character of improvements—if that term can be used properly in this connection—on the lands of respondents and intervener is shown by photographs introduced in evidence.

Record, pages 200-201.

The full period of the statute of limitations of both Montana and Wyoming has run against the claim of the respondent Howell, ten years barring actions to recover realty in both states. But a Wyoming statute is more important. It provides:

“And in case the owner or owners of any such ditch, canal or reservoir shall fail to use the water therefrom for irrigation or other beneficial purposes, or shall refuse to furnish any surplus water to the owner or owners of lands lying under such ditch as hereinafter provided, during any two successive years, they shall be considered as having abandoned the same, and shall forfeit all water

rights, easements and privileges appurtenant thereto, and the waters formerly appropriated by them may be again appropriated for irrigation and other beneficial purposes, the same as if such ditch, canal or reservoir had never been constructed."

Sec. 895, Rev. Stats. Wyoming, (1899).

The learned district judge erroneously considered this as a statute of abandonment, and held that the intention to abandon not being shown, the statute is inapplicable. This is a statute of non-user, not of abandonment. It is immaterial why the respondents did not use the water. Their failure to use it worked a forfeiture of their right. The difference between a statute of non-user and one of abandonment is pointed out in

Long on Irrigation, 83.

Abandonment is a question of intent. Failure to use the water, no matter how long continued, does not constitute abandonment. Non-user is evidence of abandonment, but the intent is the essential feature. And on the other hand, if a purpose is established not to use any more, it is immaterial how long the non-use has continued.

Under a statute of non-user, however, failure to use for the statutory period, whatever the reason, or however strong may be the purpose to use again at the first opportunity, works a forfeiture. These principles are sustained by the case of

Smith vs. Hawkins, 110 Cal. 122.

The statute operates as a statute of limitations. No other construction can possibly be given to the statute. The purpose to make the waters of the state available to the utmost is evident throughout the legislation of the State of Wyoming. In the absence of this law, water

which had been appropriated but the right to which the appropriator intended to abandon, would have become subject to appropriation by another the instant he carried out his purpose and ceased using. It certainly was not intended by this law that notwithstanding one had formed a fixed purpose not to use the water again, it should remain unavailable for a period of two years during which time he might be at liberty to change his mind and reclaim it. Clearly not. Its purpose was to fix a limit after which one might safely take it and apply it at expense to some beneficial use without being met subsequently with proof of a purpose on the part of the original owner to resume its use at some later day.

In this case the respondent Howell frankly and bluntly tells that he quit using the water or trying to use it in 1897, and determined not to attempt any further raising of crops until his right to the water should be settled. But under this statute he was obliged, having reached that determination, to commence his action within two years. His averment of a present right to the use of the water is overcome by the facts he submitted in proof.

The evidence places the respondent Morris in the same position. He too has delayed too long.

Nor is it necessary that the *whole* period of the statute should have run in order that the respondents should be denied a right of recovery in this suit.

Appeal is made here to a court of equity. The respondents are not entitled to a decree when they show only a strict legal right. They ask for the extraordinary remedy of injunction. The prayer for the injunction is the basis of the jurisdiction, and it is the only relief awarded. The necessity for the prompt and diligent assertion of his rights on the part of one

seeking the aid of equity has been repeatedly declared by this Court. In

Abraham vs. Ordway, 158 U. S. 416,
is the following:

“The property in dispute, it may well be assumed, has greatly appreciated in value since Mrs. Ordway’s purchase, which was more than ten years prior to this suit. It is now too late to ask assistance from a court of equity. The relief sought cannot be given consistently with the principles of justice, or without encouraging such delay in the assertion of rights as ought not to be tolerated by courts of equity. Whether equity will interfere in cases of this character must depend upon the special circumstances of each case. Sometimes the courts act in obedience to statutes of limitation; sometimes in analogy to them. But it is now well settled that, independently of any limitation prescribed for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done, in the particular case, by granting the relief asked. It will, in such cases, decline to extricate the plaintiff from the position in which he has inexcusably placed himself, and leave him to such remedy as he may have in a court of law. *Wagner vs. Baird*, 7 How. 234, 238; *Harwood vs. Railroad Co.*, 17 Wall. 78, 81; *Sullivan vs. Portland, etc., R. R.*, 94 U. S. 806, 811; *Brown vs. the County of Buena Vista*, 94 U. S. 157, 159; *Hayward vs. National Bank*, 96 U. S. 611, 617; *Landsdale vs. Smith*, 106 U. S. 391, 392; *Speidel vs. Henrici*, 120 U. S. 377, 387; *Richards vs. Mackall*, 124 U. S. 183, 188.

“The appellants insist that, as this suit relates to land, the doctrine of laches as announced in the above cases, has no application. There is no foundation in the adjudged cases for this suggestion. It is true, as

stated by counsel, that in *Wagner vs. Baird*, just cited, the court says that in many cases courts of equity 'act upon the analogy of the limitation of law, as where a legal title would in ejectment be barred by twenty years' adverse possession,' and 'will act upon the like limitations, and apply it to all cases of relief sought upon an equitable title, or claims touching real estate.' But it proceeds to say: 'But there is a defense peculiar to courts of equity founded on lapse of time and the staleness of the claim, where no statute of limitation distinctly governs the case. In such cases courts of equity often act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere where there has been gross laches in prosecuting rights, or long acquiescence in the assertion of adverse rights. 2 Story Eq. Sec. 1520. A court of equity will not give relief against conscience, or where a party has slept upon his rights.' "

From

Insurance Co. vs. Austin, 168 U. S. 685,
we make the following extract:

"The preliminary inquiry, therefore, is whether the complainants have so exercised their rights as to entitle them to prevent the city from completing the water works.

"In *Speidel vs. Henrici*, 120 U. S. 377, 387, the court said, speaking through Mr. Justice Ray:

"Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights, and shows no excuse for his laches in asserting them.' 'A court of equity,' said Lord Camden, 'has always refused aid to stale demands, where the party slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience.

good faith and reasonable diligence; where these are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced; and, therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court.'

"In *Hammond vs. Hopkins*, 143 U. S. 224, 250, through Mr. Chief Justice Fuller, the court said:

" 'No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith and reasonable diligence, but will discourage stale demands for the peace of society, by refusing to interfere where there has been gross laches in prosecuting rights, or where a long acquiescence in the assertion of adverse rights has occurred.' "

In *Willard vs. Woods*, 164 U. S. 502, 524, the Court said:

" 'But the recognized doctrine of courts of equity to withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time may be applied in the discretion of the court, even though the laches are not pleaded, or the bill demurred to. *Sullivan vs. Portland & Kennebec R. R.*, 94 U. S. 806, 811; *Lansdale vs. Smith*, 106 U. S. 391, 394; *Badger vs. Badger*, 2 Wall. 87, 95.' "

In the opinion filed by the learned District Judge, who ordered the decree in this case, it is said in extenuation of, if not as a complete answer to, the claim of laches on the part of the respondent Morris that he "has protested while the supply of water grew less from year to year until finally his ills became unbearable."

Record, page 308.

Even if he had done so, his conduct would be no answer to the claim of laches. In *Willard vs. Woods*, already quoted from, the court said:

"In *Lane vs. Bodley Co.*, 150 U. S. 193, and *Mackall vs. Cafflear*, 137 U. S. 556, it was held that the mere assertion of a claim, unaccompanied with any act to give effect to the asserted right, could not avail to keep alive a right which would otherwise be precluded because of laches."

But what are the facts?

The respondent Morris testifies that he never made any complaint whatever about the water; that in the year 1898 he saw petitioner Bean about water. Just what he said to Bean does not appear, but whatever he said was not by way of complaint. Bean said: "that he was going to irrigate that afternoon and he would turn the water down, and he turned the water down the creek, and it run about a half a day; then the water was shut off again."

Record, page 115.

In the year 1902, he went to see petitioner, Wallace Bent. What was said to Bent does not appear in the record, but the respondent Morris says: "Mr. Bent said that he would not let me have any water."

Record, page 117.

He testifies that these two efforts are all he can remember to have made.

Record, page 113.

The testimony is entirely consistent with the idea that he requested that the water be allowed to come down to him as a neighborly accommodation.

The respondent Howell, it will be remembered, testified that respondent Morris had been unable to raise any crops since 1894. He, himself, testified that he had not had more than half enough water for five years.

It does appear, indeed, in the evidence, that at one time the respondent Howell instituted a suit such as this—

doubtless the case of *Howell vs. Johnson*—but there is no pretense that it was brought against any of these petitioners. While, on the issue of abandonment, the prosecution of a suit against some one other than these petitioners would be pertinent as showing his intent to use the water again, on the issue of laches raised by them, it is no answer at all.

Ignorance of the wrong is the usual excuse for laches. Of course, if protest were made, it would be impossible to aver ignorance. Such a condition would tend to establish, rather than overcome laches.

The burden of establishing facts to overcome the indisposition of courts of equity to enforce rights where long delay in their assertion has ensued, is on the respondent *Morris*, and unless he avers the existence of such facts in his bill, it is demurrable. In

Hardt vs. Heidweyer, 152 U. S. 547,
the court says:

“It is well settled that a party who seeks to avoid the consequences of an apparently unreasonable delay in the assertion of his rights on the ground of ignorance must allege and prove, not merely the fact of ignorance, but also when and how knowledge was obtained, in order that the court may determine whether reasonable effort was made by him to ascertain the facts.”

The Court also in that case quotes from *Badger vs. Badger*, 2 Wall. 87, 95:

“The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how long and when he first came to a knowledge of the matter alleged in his

bill.”

To avoid, apparently, the force and effect of this rule, respondent Morris alleged in his bill that the wrongs complained of had continued only during “the past three years,” that is, the years 1900, 1901 and 1902. He did not frame his bill on the theory that he had been deprived of his water by any act of the petitioners since the year 1894, because, had he done so, the bill would have been demurrable for laches appearing upon its face. Even if he had averred that, for five years, he had been deprived of water essential to the raising of crops, some explanation of his delay would have to be made in his bill, before a court of equity would interpose in his behalf. It might, in this connection, be remarked that, prior to 1895, five years would, in Montana, have absolutely barred his rights, as is the case, or until recently was the case, in California. What excuse could now be made in the bill, if leave were asked to amend it to make it conform to the proof?

Take the case of the respondent Howell. He expressly averred that he has had the use of his appropriation to its full extent since August 1st, 1890, which sweeping assertion he followed with the further averment that, within five years the petitioners had constructed dams and ditches, and that within two years they had deprived him of the water to which he is entitled.

Suppose he had averred in his petition that he had been unable to get water since 1894 sufficient to grow crops, and that in despair he quit trying to raise them after 1897: he would, likewise, have been obliged to make some averment to relieve himself of his evident laches in seeking relief. And what avail would it have been to him, in opposition to a demurrer by these petitioners,

to have averred in his petition that, at some time in the interim, he had begun an action against somebody to prevent interference with his right.

Even though a strict right may possibly be in the parties in whose favor the decree runs, they have no standing whatever in a court of equity. If a complete case of estoppel is not made out, in view of the expenditures made by the petitioners in reliance upon their right to the water, a case is presented in which, if it ever should, the doctrine of laches ought to be applied.

V.

EXTENT OF RIGHTS OF PETITIONERS.

And particularly should it be applied in view of the pettiness of the right which respondent Morris established. His claim that he irrigated one hundred acres is without any support whatever in the record, and the overwhelming weight of the evidence, referred to in the earlier part of this brief, is to the effect that he never watered more than twenty-five acres. He had the uninterrupted use of the water from 1887 to 1893. After seven years the extent of his right ought to be measured by the application he has made of the water diverted. He had had abundant opportunity since 1887 to put so much of his one hundred and sixty acres under cultivation as he saw fit. The respondent Morris put 110 acres of his land under cultivation between 1900 and 1903.

There is no justification in the testimony for awarding respondent Morris any more water than is sufficient for the irrigation of twenty to twenty-five acres. The evidence would justify an inch to the acre, but a law of the State of Wyoming forbids awarding any more than one cubic foot per second for each seventy acres of land, for which any appropriation may be made.

“At the first regular meeting of the board of control, after the completion of such measurement by the state engineer, and the return of said evidence by said division superintendent, it shall be the duty of the board of control to make, and cause to be entered of record in its office, an order determining and establishing the several priorities of right to the use of waters of said stream, and the amounts of appropriations of the several persons claiming water from such stream, and the character and kind of use for which said appropriation shall be found to have been made. Each appropriation shall be determined in its priority and amount, by the time by which it shall have been made, and the amount of water which shall have been applied for beneficial purposes. *Provided*, That such appropriator shall at no time be entitled to the use of more water than he can make a beneficial application of on the lands, for the benefit of which the appropriation may have been secured, and the amount of any appropriation made by reason of an enlargement of distributing works, shall be determined in like manner. *Provided*, That no allotment shall exceed one cubic foot per second for each seventy acres of land for which said appropriation shall be made.”

Section 25, Act of 1890, Laws of Wyoming 1890-91, page 98.

The application to a beneficial use is an essential part of an appropriation. If the water was never applied to the irrigation of more than twenty-five acres no appropriation was ever made for more than twenty-five acres. This law, as well as the one above referred to touching non-user, becomes a part of the right, a limitation to which it is subject in any state where an attempt may be made to enforce it.

Davis vs. Mills, 194 U. S. 451.

Another law of Wyoming provides:

"A cubic foot of water per second of time shall be the legal standard for the measurement of water in this state, both for the purpose of determining the flow of water in natural streams, and for the purpose of distributing water therefrom."

Section 38, Act of 1890, Laws of Wyoming, 1890-91, page 102.

In view of these legislative acts it is difficult to see how the decree in this case can be sustained as to either of the respondents. The respondent Morris affords no basis in his bill for a decree awarding him water measured by the standard by which alone he is entitled to have it decreed to him under the Wyoming law. On the other hand the respondent Howell avers in his petition that he is entitled to $6\frac{1}{4}$ cubic feet per second and without any averment whatever in his petition advising the court as to the quantity of water that is measured by the miner's inch as the standard, he is awarded, 110 inches, miner's measurement.

The petition in intervention does not support the decree in behalf of the respondent Howell; it is unsupported in respect to the amount awarded by any pleading whatever. The rule that the judgment must be supported by the pleadings is as firmly established in the equity practice as it is at law.

Fletcher's Equity, 712.

Nor would the situation be improved if proof had been made of the relation between the two methods of measurement, for it is the rule in equity also that "the court can no more consider what is proved, but not alleged, than what is alleged, but not proved."

Fletcher's Equity, 636.

The respondent Morris's case is in no better shape. He avers an appropriation of 250 inches statutory measurement and is decreed 100 inches "miner's measurement."

A Montana statute provides as follows:

"Section 2. Where water rights expressed in miners' inches have been granted, one hundred miners' inches shall be considered equivalent to a flow of two and one-half cubic feet (18.7 gallons) per second; two hundred miners' inches shall be considered equivalent to a flow of five cubic feet (37.4 gallons) per second, and this proportion shall be observed in determining the equivalent flow represented by any number of miners' inches."

Session Laws 1899, page 117.

But that, however, is an arbitrary statutory rule, and it need not be said that the extent of the right of the respondent is to be determined by the Wyoming law, not that of Montana. But if the relation between the two standards fixed by the Montana law should be regarded, then respondent Howell, irrigating one hundred and ten acres, is entitled, not to one hundred and ten inches of water, but to forty-seventieths of one hundred and ten, or sixty-three inches; and respondent Morris is entitled to forty-seventieths of twenty-five inches or fourteen inches.

But if the Wyoming law making the cubic foot per second the standard of measurement and limiting the right of the appropriator to one cubic foot for each seventy acres is to be disregarded, still the decree is so indefinite as to the amount awarded as to be incapable of enforcement. What quantity of water is a miner's inch? It is one quantity in one community and another in another.

The court held in

In re Huntley, 85 Fed. 889-893,
that a decree awarding "150 inches, statutory measure-
ment," is void for uncertainty.

Long on Irrigation, 97.

says:

"So, also, where the plaintiff alleged in his com-
plaint that he was entitled to 'five hundred inches,
measured under a four-inch pressure,' of the waters
in controversy, a verdict of the jury that he was en-
titled to 'forty inches, miners' measurement,' was
held void for uncertainty, since the term 'miners'
measurement' has no fixed meaning, and the miners'
inch varies in different localities."

and for the text the author refers to

Dougherty vs. Haggin, 56 Cal. 522.

It is well known that, other considerations being dis-
regarded, water is measured by miners in some places
under a four inch pressure and in others under a six
inch pressure. Anyway, the amount of water to which
the respondent Morris is entitled (we say nothing of the
respondent Howell because it seems altogether clear that
as to him the decree cannot be sustained) is so pitifully
small that in view of his laches, he ought not to have the
equitable remedy of injunction against these petitioners.

VI.

THE NOTICES OF LOCATION.

It was conceded in the trial court that the notice of his
appropriation filed by respondent Morris did not conform
to the requirements of the Wyoming law in force at the
time the appropriation was made, but it was insisted,
and the court held, that the method of making an appro-
priation defined by the statute was not exclusive, but that
by following it the appropriation related back to the
initial act prescribed by the law to be done. And it was

said that Moyer vs. Preston had practically so held, which is doubtless true.

But it will be impossible, as we take it, for any court to hold that since the enactment of the law of 1890 it is possible to acquire a water right in Wyoming except upon compliance with its terms. The whole scheme and purpose of that act was to do away with the contentions and controversies, the uncertainties that arose by reason of promiscuous appropriations made without any official surveillance. The scheme of the act was to afford, through the office of the state engineer, exact information to subsequent appropriators as to the quantity of water already appropriated from any particular stream; to deny to any person the right to place upon record a notice of appropriation of water in amount vastly in excess of what he could beneficially use, and to prevent him from asserting in any other way, to the deterrence of those who might desire to make subsequent appropriations, a right to more water than could reasonably be decreed to them, should his right be adjudicated.

This plan and purpose is deduced from the act as a whole, rather than from any specific provision, but it is sufficiently evidenced by Section 34, as follows:

“Sec. 34.—Every person, association or corporation hereafter intending to appropriate any of the public waters of the State of Wyoming shall, before commencing the construction, enlargement or extension of any distributing works, or performing any work in connection with said appropriation, make an application to the president of the board of control for a permit to make such appropriation. Said application shall set forth the name and post office address of applicants, the source from which said appropriation shall be made, the amount thereof as

near as may be, the location and character of any proposed work in connection therewith, and the time required for their completion, said time to embrace the period required for construction of ditches thereon, and the time at which the application of water for beneficial purposes shall be made, which said time shall be limited to that required for the completion of work when prosecuted with due diligence, the purpose to which the water is applied, and if for irrigation, a description of the lands to be irrigated thereby; and any additional facts which may be required by the board of control. On receipt of this application, which shall be of a form prescribed by the board of control, and to be furnished by the state engineer without cost to the applicant, it shall be the duty of the state engineer to make a record of the receipt of said application, and to cause the same to be recorded in his office, and to make a careful examination of said application, to ascertain whether it sets forth all the facts necessary to enable the board of control to determine the nature and amount of the proposed appropriation. If upon such examination, the application shall be found in any way defective, it shall be the duty of the state engineer to return the same to the applicant for correction. If there is unappropriated water in the source of supply named in the application, and if such appropriation is not otherwise detrimental to the public welfare, the state engineer shall approve the same by endorsement thereon, and shall make a record of such endorsement in some proper manner in his office, and return the same so endorsed to the applicant, who shall, on receipt thereof, be authorized to proceed with such work and to take such measures as may be necessary to protect such appropriation. If there is no unappropriated water in the source of supply, or if, in the judgment of the state engineer, such appropriation is detrimental to

public interests, the state engineer shall refuse such appropriation, and the party making such application shall not prosecute such work, so long as such refusal shall continue in force; and *Provided, however,* That the state engineer may, upon examination of such application, endorse it approved for a less amount of water than the amount stated in the application, and for a less period of time for perfecting the proposed appropriation than that named in the application, and *Provided, further,* That an applicant feeling himself aggrieved by any endorsement made by the state engineer upon his application, may in writing, in an informal manner and without pleadings of any character, appeal to the board of control, and if he shall deem himself aggrieved by the order made by the board of control with reference to his application, he may take an appeal therefrom to the district court of the county in which shall be situated the point upon the proposed source of supply at which the diversion of the proposed appropriation is to be made. Such an appeal shall be perfected when the applicant shall have filed in the office of the clerk of such district court a copy of the order appealed from, certified by the secretary of the board of control, as a true copy, together with a petition to such court, setting forth appellant's reason for appeal. Such appeal shall be heard and determined upon such competent proofs as shall be adduced by applicant, and such like proofs as shall be adduced by the board of control, or some person duly authorized in its behalf."

Laws of Wyoming. 1890-91, pages 100-101.

That this method of acquiring a water right is exclusive seems to be the view of the Wyoming court.

Whalon vs. North Platte, 71 Pac. 995-998.

There can be no pretense of any compliance on the part of the respondent Howell, and it is impossible to conceive

of his having a water right in Wyoming. According to his own testimony he commenced work on the ditch in August, 1890,

Record, page 128,

but did not use any water through the ditch until the next year.

Record, page 135.

The notice which he filed states that water was first run through the ditch August 4, 1891.

Record, page 139.

He had not effected an appropriation until he actually applied the water through his ditch to the beneficial use for which he made the diversion.

Long on Irrigation, 47;

3 Farnham on Waters, 668.

Until that time his right was inchoate.

Smyth vs. Neal, 49 Pac. 850.

It was like an inchoate right of dower, subject to legislative control.

Randall vs. Krieger, 23 Wall. 137.

VII.

POINT OF DIVERSION.

The respondents fail to allege and prove that they made their appropriations on the public domain, or that they acquired the right to make their appropriation from some riparian owner. Such allegations and proof are absolutely essential, and their case must necessarily fail.

Smith vs. Denniff, 24 Mont. 20; 60 Pac. 398;

Cave vs. Tyler, 65 Pac. 1089;

City of Santa Cruz vs. Enright, 30 Pac. 197;

Gould vs. Eaton, 49 Pac. 577.

In Smith vs. Denniff the Court said:

“But this privilege or right to appropriate the

water of a stream can in any and every case be taken advantage of or exercised only by one who has riparian rights, either as owner of the riparian land, or through a grant of the riparian owner."

As respondents' points of diversion are not situated on their lands, they must show that they have exercised this right on public domain, or state lands, or obtained the right of diversion of the owner of the soil where they make the diversion.

In *Cave vs. Tyler*, the court said:

"The burden of showing the diversion was made on the public domain was upon respondents, if that fact was essential to respondents' asserted rights under the laws of Congress, as we think it was."

The contention based on these authorities was met below by the suggestion that both the California and the Montana cases, or at least *Smith vs. Denniff* among the latter, recognize riparian rights, and that, accordingly, it is logical for the courts of those states to hold that the riparian rights must be shown to have been extinguished, either by showing that the appropriation was made on the public domain, when that result would be accomplished by the act of 1866, or by grant from the riparian proprietors; but that, as riparian rights are not recognized in Wyoming, the authorities are inapplicable.

But that is not the basis of the doctrine at all. It was re-asserted by the Supreme Court of Montana in

Prentice v. McKay, 38 Mont. 114,

and it is there shown that the reason for the rule is that no one can claim to have acquired a right which he could have initiated only by trespass on the lands of another.

The following language is quoted from the opinion:

"This being a suit in equity, we may inquire whether the respondent in fact made an appropria-

tion of this water in 1893 or in 1899. The water which she assumed to appropriate was produced in springs and a stream on the land in section 19 above, then owned by S. C. Prentice in fee, subject only to a mortgage to Mrs. McKay. The United States and the state of Montana have recognized the right of an individual to acquire the use of water by appropriation (Rev. Stats. U. S., secs. 2339, 2340, U. S. Comp. Stats. 1901, p. 1437); Revised Codes, secs. 4840 et seq.; *Wood v. Etiwanda Water Co.*, 122 Cal. 152, 54 Pac. 726; *Welch v. Garrett*, 5 Idaho 649, 51 Pac. 405); but neither has authorized, nor, indeed, could authorize, one person to go upon the private property of another for the purpose of making an appropriation, except by condemnation proceedings. The general government has merely authorized the prospective appropriator to go upon the public domain for the purpose of making his appropriation (see note to *Heath v. Williams*, 43 Am. Dec. 265, 25 Me. 209), and the statutes of this state (secs. 4840-4891, above) only apply to appropriations made on the public lands of the United States or of the state, and to such as are made by individuals who have riparian rights either as owners of riparian lands or through grants from such owners. This is the doctrine announced in *Smith v. Denniff*, 24 Mont. 20, 81 Am. St. Rep. 408, 60 Pac. 398, 50 L. R. A. 741, where the court further said: 'A trespasser on riparian land cannot lawfully exercise there any right to such water or acquire any right therein by virtue of sections 1880 et seq. of the Civil Code of 1895 (sections 4840 et seq., Revised Codes). (*Alta Land Co. v. Hancock*, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645.)' In the same opinion this court also said: 'One may not acquire a water right on the land of another without acquiring an easement in such land.' And again: 'An easement is an interest in land that

cannot be created, granted, or transferred except by operation of law, by an instrument in writing, or by prescription.' Since the use of water is declared by the Constitution of this state (Article III, sec. 15) to be a public use, the right to appropriate water on the land of another may be acquired by condemnation proceedings. (Smith v. Denhiff, above; St. Helena Water Co. v. Forbes, 62 Cal. 182, 45 Am. Rep. 659.)"

The decree as to the respondent Howell should be reversed:

1. Because the court had no jurisdiction to adjudicate his rights against the petitioners, diversity of citizenship being wanting.

2. Because he never made an appropriation, or was granted leave to appropriate water in the State of Wyoming as required by its laws, and hence never made any appropriation.

3. Because whatever right he did have is barred by the statute of limitations, and by the statute of non-user.

4. Because his unexcused laches forbids the granting to him of any relief in equity.

5. Because as to the quantity awarded to him, it is unsupported by any pleading.

6. Because the quantity of water awarded to him is uncertain, indeterminate and measured by a standard unknown to the laws of Wyoming.

The decree as to the respondent Morris should be reversed:

1. Because by consenting to the respondent Howell's becoming with him a party plaintiff, the jurisdiction of the court was lost.

2. Because whatever right he may have had is barred by the statute of non-user.

3. Because his laches forbids to him any remedy in equity.

4. Because he never effected an appropriation of more than enough water to irrigate 25 acres,—under the evidence, 25 inches.

5. Because he avers in his bill that he is entitled to, and the decree awards him, a quantity of water measured by a standard unknown to the laws of Wyoming.

6. Because the quantity of water awarded to him is uncertain and indeterminate.

It should be reversed as to both the respondents Morris and Howell:

1. Because such rights as they have in the waters of Sage Creek they have by virtue of the laws of the State of Wyoming, and to such waters only as shall be flowing in that stream in the State of Wyoming, gathered in that state or allowed to flow into it by the citizens of Montana from their state.

2. Because any right they may have in the waters of Sage Creek is necessarily subject to the rights of appellants, settlers on lands within what was the Crow Reservation, at the time of the appropriation of respondents, and appropriators of the water of the reservation.

3. Because the amount in controversy, as shown by the bill, does not exceed \$2000.00, and the court had no jurisdiction for that reason.

4. Because the proofs show no appropriation by either

of the parties named, on the public land, or on private lands with the consent of the owner.

Respectfully submitted,

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Solicitors for Petitioners.

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Of Counsel.

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JAMES H. McKENNEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1910.

No. 122.

J. N. BEAN, W. B. BAINBRIDGE, S. W. BENT, WAL-
LACE BENT AND CORBETT BENNETT.

Petitioners.

vs.

W. A. MORRIS AND T. N. HOWELL.

Respondents.

BRIEF OF RESPONDENT AND INTERVENER.
T. N. HOWELL.

ALEXANDER M. MCCOY,
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WM. M. ELLISON,

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W. A. MORRIS AND T. N. HOWELL,
Respondents.

BRIEF OF RESPONDENT AND INTERVENER,
T. N. HOWELL.

I.

STATEMENT OF CASE.

This case was originally brought in the United States Circuit Court, Ninth Circuit, District of Montana. In Equity, by William A. Morris against J. N. Bean, et al. (Tr., p. 2).

Complainant alleging, that he was at the time of the bringing of the suit and for fifteen years prior thereto, had been a resident and citizen of the Territory and State of Wyoming, and that the defendants were all citizens and residents of the Territory and State of Montana.

And, further alleging, that the amount involved in this action exceeds the sum of two thousand dollars, exclusive of interest and costs (Tr., p. 2).

The complainant, who is in this court as respondent, further alleging that he is the owner of one hundred and sixty acres of agricultural land situated in Wyoming, which he settled upon as his homestead in the spring of 1887, and thereafter

acquired patent to the land under the homestead laws of the United States. The lands being arid in character and requiring irrigation, complainant, in April, 1887, constructed a ditch by means of which he diverted water for the irrigation of his homestead from a stream known as Sage Creek. This stream rises in the Pryor Mountains in the State of Montana, and flows thence in a southerly direction into the State of Wyoming, and empties into the Shoshone River denominated and known as the Stinking Water River. The appropriation of the complainant Morris was made in Wyoming and the appropriations of the defendants, appellants and appellees are admittedly several years subsequent in time to that of the complainant Morris.

The respondent, T. N. Howell, filed his petition in intervention on September 5, 1903, by and with the written consent of all of the parties to the action, including the five appellants. At the time of filing his petition in intervention he was a citizen and resident of Wyoming. He is the owner of two hundred acres of agricultural lands situated in the State of Wyoming, for which, in August, 1890, he made an appropriation out of the waters of Sage Creek, in Wyoming. The water right of the intervener, Howell, is likewise prior in time to that of any of the defendants, appellants and appellees. Both the original complainant and intervener have used the waters of Sage Creek upon their respective ranches continuously, raising crops thereon, ever since the dates of their several appropriations, except when interfered with by the defendants, appellants and appellees, who tapped the waters of Sage Creek in Montana, above the points of diversion of complainant and intervener. An injunction was sought in this action to prevent this interference by which the complainant and intervener were being deprived of their prior rights to the waters of Sage Creek, and its tributary, Piney Creek.

Depositions were taken on behalf of all the parties to the action, and the cause referred to the Master, who reported his findings of fact and conclusions of law, which were in the main favorable to the complainant and intervener. These findings and the exceptions to them were argued before the Hon. Edward Whitson, sitting during the absence of the presiding judge of the District of Montana, and his findings of fact and conclusions of law were all in favor of the complain-

ant and intervener, and decree in their favor was thereafter duly entered and filed. His very able and learned opinion in this case is to be found reported in:

Morris vs. Bean, 146 Fed., 423;

Also in the Transcript of this case, pp. 298 *et seq.*

From the judgment rendered in favor of the complainant and intervener only five of the defendants have appealed to this court, viz.: J. N. Bean, W. R. Bainbridge, S. W. Bent, Wallace Bent, and Corbett Bennett.

II.

We respectfully submit that the facts and circumstances of this case are not such as to justify the interposition of the Supreme Court by way of certiorari.

In the syllabus to the case of *Caroline M. Forsyth vs. City of Hammond, et al.*, 166 U. S., 504-506; 41 Law. Ed., 1095, we read as follows "This court will sparingly exercise the power to require a case to be certified to it by the Circuit Court of Appeals, and will exercise it only when the circumstances of the case show that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a State, or some matter affecting the interest of the nation in its internal or external relations, demands such exercise."

The body of the case cited and other authorities set forth therein strongly sustain the above quotation.

III.

Again, we respectfully submit that the application for the writ in this case was not made within reasonable and proper time.

The decision in the Court of Appeals was rendered on the 3d day of February, 1908. The application for certiorari appears to have been made at the October term, 1908.

On this point we cite the following authorities:

The Conqueror, 166 U. S., 110, 41 Law. Ed., 937;

Panama R. Co. vs. Napier Shipping Co., 166 U. S., 284, 41 Law. Ed., 1005;

Bonin vs. Gulf Co., 198 U. S., 115, 49 Law. Ed., 970;
Ayres vs. Polsdorfer, 187 U. S., 585, 47 Law. Ed., 314.

IV.

On page 7 of Petitioners' Brief we find the heading, "Extent of Complainant's Right." Then, on page 25, under the heading, "Argument" and "Jurisdiction of Court," we find the subheading, "Amount in Controversy." Again, under "Specifications of Error," Petitioners' Brief, "IV," we have the following:

"It was error in the court to hold that the amount in controversy between the respondent Morris and petitioners exceeded \$2,000.00, or that the court upon the averments of the bill or under the proofs had any jurisdiction of the subject-matter, and it was error to enter any decree herein, for that it appears from the bill of complaint that the amount in controversy does not exceed \$2,000.00, and that, therefore, the Circuit Court had no jurisdiction of the subject-matter of the action."

Complainant alleged in his bill of complaint that the amount involved in this action exceeds the sum of \$2,000.00, exclusive of interest and costs. The Act of Congress of March 3, 1891, conferred jurisdiction upon Circuit Courts of the United States in suits where there is a controversy between citizens of different States in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000.00. In this action there is a controversy between citizens of Wyoming on the one side and citizens of Montana on the other side, and the matter or thing in dispute is the water rights of the Wyoming appropriators. The jurisdiction, then, rests upon the value of the water right of the complainant, W. A. Morris, who, as a citizen of Wyoming, instituted this action. The appellants denied in their answer that the amount in dispute exceed \$2,000.00. There was a straight issue, then, of the fact as to whether the water right, the thing in dispute, did exceed the sum or value of \$2,000.00. If it did, the Circuit Court had jurisdiction. Some eight witnesses testified as to the value of the water rights of the complainant and intervener, respectively. Most of the witnesses gave their

depositions in response to written interrogatories. The following interrogatory was propounded to them:

Int. XII. "State the value of the water right of W. A. Morris and T. N. Howell, respectively." (Tr., p. 93.)

James F. Lampman testified:

"The value of a water right is whatsoever a ranch is worth, without buildings and fences, for, without water, land in this section of the country is not worth the Government price of \$1.25 per acre, and the ranches of W. A. Morris and T. N. Howell in this locality where their ranches are located, land is worth and would sell readily for a price ranging from \$20.00 to \$30.00 per acre, with a good and sufficient water right." (Tr., p. 93.)

Charles A. Sarver testified (Int. XII and XIII, Tr., p. 94):

"Whatsoever the value of the property is, without the fences or buildings, for land in this section of the country is worthless and would not be worth the taxes that are assessed against it, without water to irrigate. At the time that Mr. Morris and T. N. Howell settled upon their land there was sufficient water flowing in Sage Creek to thoroughly and permanently irrigate the said ranches of W. A. Morris and T. N. Howell during the irrigating season if allowed to come down, and it did flow during the time that I stated above, and I consider W. A. Morris' and T. N. Howell's ranches, they being in a locality that is contiguous to a range for stock, would readily sell for \$40.00 an acre, with a good and sufficient water right, and there is upon W. A. Morris' ranch 240 acres that could easily be watered from Sage Creek, if the water was not molested by parties in Montana." (Tr., p. 94.)

James F. Howell (not the intervener), testified:

"A water right, the value of which is the amount that you could get for your ranch per acre, less the improvements thereon in the way of buildings and fences, for in this locality land is considered worthless without water and would not sell for the price the Government asked for it; but those ranches, with a good and sufficient amount of water to sufficiently irrigate, would bring upon the market to-day the price of \$30.00 an acre." (Tr., p. 95.)

Owen G. Norton testified:

"The value of the water right is what the ranch would sell for, for without water a ranch is worthless and would not pay the price of the taxes assessed against it." (Tr., p. 96.)

Richard B. Heritage testified:

"The water right is considered to be worth whatsoever a ranch would bring upon the market without any improvements in the shape of buildings and fences, for without water sufficient to thoroughly irrigate a ranch, the ranch is worthless." (Int. XII, Tr., p. 98.)

Joseph N. Howell (not the intervener) testified:

"A water right is worth whatsoever the ranch or ranches would sell for, for a ranch without water is worthless, and no one could exist on the same, and either of those ranches would sell quickly for \$20.00 or \$30.00 an acre, as they are in a good locality and consist of very rich soil." (Int. XII, Tr., p. 99.)

All of the above witnesses testified that the Complainant Morris and Intervener Howell each had ample and sufficient water to thoroughly irrigate their lands prior to the diversion of the water by the parties in Montana.

The complainant, W. A. Morris, was asked the following question:

"Q. What have you got to say as to its being arid and requiring irrigation to make it produce crops?"

"A. If you ain't got water you can't raise a thing on it; you have got to have water or the land is no good." (Tr., p. 113.)

The intervener, T. N. Howell, testified as follows:

"Q. What have you got to say as to the necessity of the use of water to make it produce?"

"A. It wouldn't be worth a cent without water."

"Q. What is your land worth?"

"A. About \$25.00 an acre."

"Q. Now, what is the water worth?"

"A. About the same; the land wouldn't be worth anything without the water."

"Q. I will ask you what you have to say as to Morris' land and water right?"

"A. I think his is about the same." (Tr., p. 128.)

From the above testimony it appears that the value of the Morris water right is from \$3,200.00 to \$4,800.00, and the value of the Howell water right is from \$4,000.00 to \$6,000.00. The court, therefore, did right in finding that the amount in controversy, in this suit exceeds \$2,000.00, and the amount involved in this case is ample to sustain the jurisdiction of the court.

Rayney *vs.* Herbert, 55 Fed., 443;
Miss. & Mo. R. Company *vs.* Ward, 67 U. S., 485
Stinson *vs.* Dousman, 20 How., 461, S. C. 2 Miller, 525.

Upon the question of "Amount In Controversy," we cite the following:

Smithers *vs.* Smith, 204 U. S., 632, 51 Law. Ed., 656;
Put-in-Bay Water Works, Light & R. Company *vs.*
Ryan, 181 U. S., 409, 45 Law. Ed., 927;
Wyley *vs.* Sinkler, 179 U. S., 58, 45 Law. Ed., 84.

V.

The point appears to be made for petitioners that the Bill of Complaint does not properly aver the amount in controversy as exceeding two thousand dollars. This received careful consideration from the learned judge in the decision in the Circuit Court, page 429, and after reciting the testimony and authorities, the court said:

"Complainant will be given leave to amend his bill to conform to the proofs upon this view."

On page 9 of "Petitioners' Brief" we find the heading, "Citizenship of Intervener." Then, on page 29, under the heading, "Argument" and "Jurisdiction of Court," we find a similar heading.

It is contended that the intervener, Howell, was not a citizen of Wyoming, and also that the jurisdiction failed because of his alleged citizenship.

Error X is assigned because the appellants allege that Howell was not a citizen of Wyoming, but was a citizen of Montana,

and that the court erred in permitting him to file his petition in intervention and that the court should have dismissed his petition, for the reason that the jurisdiction of the court fails with the failure of the complainant Morris to sustain his right of action. The last ground, of course, need not be considered, since we have shown conclusively that the complainant Morris did sustain his right of action and has a good and valid appropriation of the waters of Sage Creek, and being admittedly a citizen and resident of the State of Wyoming, the jurisdiction of the court would attach, regardless of whether Howell is a citizen of Wyoming or of Montana. We are a little surprised that the appellants should urge as error the action of the court in permitting T. N. Howell to file his petition in intervention, when all of the appellants gave written consent to the filing of said petition in intervention, as well as the other defendants in the case. (Tr., pp. 31 and 32.)

The court below having acquired jurisdiction by reason of the diverse citizenship of the complainant Morris and the defendants, it was not error to permit Howell to intervene to protect his rights regardless of his citizenship.

Conwell *vs.* White Water Valley Canal Company, Federal Cases No. 3148;

Osborne & Company *vs.* Barge, 30 Fed., 805.

Belmont Nail Company *vs.* Columbia Iron and Steel Company, 46 Fed., 336.

T. N. Howell swears in his petition in intervention (Tr., pp. 26 *et seq.*), verified on the 11th day of August, 1903, and filed September 5, 1903, that he is now and for twelve years past, has been a citizen of the United States, and of the Territory, now State, of Wyoming. Mr. Howell testifies that he was a resident at the time of giving his testimony in Billings, Mont., but had formerly ~~resided~~ ^{resided} in the Stinking Water Country Fremont County, Wyoming (Tr., p. 27). Mr. Howell may, after 1897, have gone to Billings and may have lived there temporarily while looking after his action against these defendants, but it is apparent that he was a citizen as well as a resident of Wyoming at the time he filed his petition in intervention in 1903. On February 6, 1903, we find from the receipt issued by the Receiver of the United States Land Office at Lander,

Wyoming, that Thomas N. Howell was at that time a resident of Big Horn County, State of Wyoming (Tr., p. 141, Rec. Receipt, Ex. A). The sworn statement of claim to water gives the postoffice address of Howell as Lovell, Wyoming. (Tr., p 139, Pltff. Ex. B-3.)

The question as to what place a party considers his home or residence is a matter of intent of the party himself. Temporary absence at Billings, Mont., would not change the residence of Howell nor make him a citizen of Montana, and there is no proof that he is a citizen of Montana, but all the proof goes to show that he is a citizen of Wyoming. However, it is immaterial in this case whether he is a citizen of Montana or Wyoming.

In the case of *Miller & Lux vs. Rickey et al.*, and other cases, 146 Fed., 574, we have the following:

"The suggestion is made that this court has no jurisdiction of certain cross-bills because the parties thereto are citizens of the same State. This is without merit. The cross-bills are all ancillary to the original suit of *Miller & Lux vs. Rickey, et al.* (No. 731). The principle is well settled that a cross-bill of this character is not an original suit, but it ancillary and dependent, supplementary merely, to the original suit out of which it arises, and is maintained without reference to the citizenship and residence of the party. It does not depend upon the citizenship of the party, but of the subject-matter of the litigation."

Many citations of authorities are there made to support the text.

It will be noted that in the said case of *Miller & Lux vs. Rickey et al.* the issues and facts were precisely the same as in this case, to-wit: an action brought in the Circuit Court for the District of Nevada by *Miller & Lux* as appropriators of water in the State of Nevada to restrain the defendants from taking water from the same stream in the State of California where said stream had its rise.

Again, in the case of *Ames Realty Co. vs. Big Indian Mining Co. et al.*, 146 Fed., 166, we find the following:

"The rule is that consolidations, cross-bills, and interventions do not oust the jurisdiction of the court in the main suit, whatever the citizenship of the parties thus brought in may be."

Many citations of authorities are there made to support the text.

In the case of Rickey Land & Cattle Co., petitioner, *vs.* Miller & Lux (No. 5), being the same case above referred to as Miller & Lux *vs.* Rickey et al. on certiorari to the Supreme Court, decided November 7, 1910, we find the following:

"It is urged that the cross-bills on which the bill and injunction in the second case were based were not maintainable because not made in the defences of the original suit of Miller & Lux. But it might very well be, as shown by the argument to the respondent that even if they admitted the right of Miller & Lux, still a decree as between themselves and other defendants would be necessary in order to prevent a decree for Miller & Lux from working justice. See, further, Ames Realty Co. *vs.* Big Indian Min. Co., 146 Fed., 166. The cross-bills being maintainable, the jurisdiction in respect of them follows that over the principal bill."

VI.

On page 15 of petitioners' brief we find the heading, "Laches, Abandonment, Non-user and Statute of Limitations," and on page 77, under the heading "Argument," we find the sub-heading "Laches, Adverse-user and Abandonment," and on page 18 the heading, "Estoppel."

Error XI is assigned by appellants asserting that the complainant and intervener are estopped from maintaining this action, and Error X is urged to show that the complainant and intervener are guilty of laches. It is contended on the part of the appellants that the complainant and intervener should not be allowed to set up their rights to the waters of Sage Creek, because they knew that the appellants were making improvements on their ranches, and depended upon the use of these waters to sustain them. It can be said with equal, if not with greater force, that the appellants knew that the complainant and intervener had made improvements upon their ranches, had cultivated and tilled the soil, and had been raising large crops thereon for many years prior to their locations in Montana, and were so doing at the time of their settlements, and were dependent upon their prior appropriations of the waters of Sage Creek for these purposes. It occurs to us that if anyone should be stopped it is the appellants.

"Estoppel by conduct is where a person by his conduct induces another to believe in the existence of a particular state of facts, and the other acts thereon to his prejudice; and estoppel by laches is where a person neglects to do something which he should do, or fails to enforce a right at a proper time."

16 Cyc., 680.

What conduct of either the complainant or intervener has led either of the appellants to believe that he had a prior water right to them? What neglect have either complainant or intervener been guilty of? Have the Wyoming appropriators concealed anything from the Montana appropriators, which has led them to place valuable improvements upon their lands, to their prejudice? What fraud have the Wyoming appropriators perpetrated upon the Montana appropriators? What facts have they withheld? None whatever. The conduct and acts of the Wyoming appropriators have been such all the time as to put the Montana appropriators on their guard, and if they expended money in seeding their lands and placing improvements thereon, dependent upon the water right to which they had a junior appropriation, they did so at their own risk. The fertile fields of the low-landers in Wyoming depending for their fertility upon the waters of Sage Creek, were in full view of the high-landers in Montana. The repeated demands of the Wyoming appropriators upon the Montana appropriators, and the suits that were instituted, were certainly sufficient warning to them not to invest their money in such precarious and uncertain an enterprise, and if they did do so, they did it at their own peril, and they cannot now say that the Wyoming appropriators are guilty of laches and should be estopped.

The case of *Rigney v. Tacoma Light and Water Company*, 38 Pac., 147, is a leading authority upon the question of estoppel and laches in reference to water rights. The defendant company furnished water to the city of Tacoma, and in order to do so made connections and built its structures at great expense in bringing the water to the city from the source of supply. The plaintiff stood by and made no objections to the company expending these large sums of money and waited for about ten years before he brought this suit for an injunction against the company to restrain them from taking the water. It is asserted that the plaintiff has virtually slept upon the right

he now claims for a period of ten years and allowed the defendants to expend large sums of money in structures and improvements. The court held in this case, page 150, second column:

"The case seems to be wanting in the essential elements of an estoppel proper." An estoppel is well defined by Judge Peckham in *Rubber Co. v. Rothery*, 107 N. Y., 310, as follows: "To constitute it (an estoppel) the person sought to be estopped must do some act or make some admission with an intention of influencing the conduct of another, or, that he had reason to believe would influence his conduct, and which act or admission is inconsistent with the claim he proposes now to make. The other party, too, must have acted upon the strength of such admission or conduct." It is not shown that either the plaintiff or his grantor did any act or make any admission with the intention of influencing the conduct of the defendants, or, that the latter did the acts complained of by reason of any acts or admissions on the part of the former. The principle of estoppel is, therefore, inapplicable here.

But it is claimed that at all events the kindred and analogous principle of acquiescence or laches is applicable and constitutes a complete bar to the action. It is true that this action was not commenced against the defendant corporation until nearly nine years after it began to divert the waters from the premises now owned by the plaintiff. It is true also that courts of equity, in the exercise of a sound discretion have often refused to suitors soliciting their intervention who have failed to assert their rights in court as promptly as they should have done; but it by no means follows that in no case will relief be granted in equity where there has been considerable delay in applying for it. It is often remarked by courts and text writers that courts of equity will refuse relief to stale demands, but even in cases where delay is allowed to operate as a defense the question is to be determined in the discretion of the court upon all of the circumstances of the case. If it appears in any particular case that the laches of the complainant have not been such as to show his assent to the acts complained of and their consequences, he ought not to be turned out of court simply because he might have begun his action sooner.

The opinion of the court in this case is condensed in the following syllabi:

"Where it is not shown that either the plaintiff or his grantor did any act or made any admission with the intention of influencing the conduct of the defendants, or that defendants did the acts complained of by reason of any acts or admissions on the part of the plaintiff, the principle of estoppel is inapplicable."

"In a suit commenced nine years after defendant began to divert water from plaintiff's premises, it appearing that none of the flumes, dams, and other structures causing such diversion were erected on plaintiff's land, that defendant had full knowledge of plaintiff's rights, and that plaintiff had never assented to such acts of defendant, and, on remonstrating, was told that such use of the water was to be only temporary, held, that defendant could not set up laches or acquiescence on the part of plaintiff."

In the case of *Galway vs. Metropolitan Railway*, 128 N. Y., 132, it is held:

"No lapse of time or inaction merely on the part of an owner after the erection and during the maintenance of the unlawful structure, unless it has continued for such a period of time as will affect a change of title in the property or authorize the presumption of a grant, is sufficient to defeat the right of the owner to his action at law or equity."

"Where a legal right is involved, and upon grounds of equity jurisdiction, the courts have been called upon to sustain the legal right, the mere laches of a party, unaccompanied by circumstances amounting to an estoppel, constitute no defense."

In the case of the *New York Rubber Company vs. Rothery, et al.*, 107 N. Y., 310, it is held:

"To constitute an equitable estoppel there must have been some act or admission by the party so sought to be estopped, inconsistent with a claim he now makes, and done or made with the intention of influencing the conduct of another which he has reason to believe would, and which did, in fact, have that effect. Silence will not estop unless there is not only a right, but a duty to speak."

In the case of the *Lower Latham Ditch Company vs. Loudon Irrigating Canal Company*, 60 Pac., 629 (Colo., 1900), the court held, Laches:

"The fact that plaintiff knew for several years that his shortage in water supply was caused by diversion of the water of a stream by defendant's ditch, and made no protest, does not show any laches or acquiescence on his part amounting to an abandonment of his decreed priority."

The same court held on the question of Estoppel:

"The fact that the plaintiff knew of the diversion of water by defendant's ditch for several years, without interfering with the same, did not constitute an *estoppel*, where there was no evidence that by his conduct he intended to deceive, or was guilty of such negligence as amounted to fraud, or that the party diverting the water was not only destitute of all knowledge regarding the state of his title, but of the means of acquiring such knowledge."

In the case of *Smyth v. Neal*, 49 Pac., 850, in an opinion by Judge Wolverton, it is held:

"Plaintiff, by making favorable representations to defendant of the desirability of his neighborhood for settlement, and by discussing methods for irrigation, and stating that he thought the supply of water from the creek was sufficient for them both (the defendant having used the water from 1886 to 1895), and making no objection to his use of the water therefrom, is not estopped to claim a superior right to so much of the water as prior to and during all such time he had been using it for beneficial purposes, to the knowledge of the defendant."

The case of *Biddle Boogs v. The Merced Mining Company*, 14 Pac., 279, has been extensively cited and referred to upon the proposition which this case holds, page 368, "that there must be some degree of turpitude in the conduct of a party before a court of equity will estop him from the assertion of his title, the effect of the estoppel being to forfeit his property and transfer its enjoyment to another."

See also—

Stockman v. Riverside L. & I. Co., 64 Cal., 59;

Anaheim Water Co. v. Semi-Tropic W. Co., 64 Cal., 195;

Lux v. Haggin, 69 Cal., 266;

Meyendorf *vs.* Frohner, 3 Mont., 321;
 Brant *vs.* Virginia Co., 93 U. S., 336;
 Menendez *vs.* Holt, 145 U. S., 368, 12 Sup. Ct., 873;
 Farmers, Etc., Bank *vs.* Farwell, 58 Fed., 639.

From the above authorities and the testimony in the case there is no principle of estoppel which the appellants can call to their aid, and the doctrine of laches cannot be relied upon by them.

It would be very much in point for us to quote here also from the opinion and decision of the learned judge who heard this case in the District Court. We do not deem it necessary, however, to make such quotation, as we think it sufficient merely to give the reference. Under the heading, "Statute of Limitations," "Abandonment," and "Estoppel and Laches," at pages 533-435 of 146 Fed., these points are very fully presented in said opinion and decision. The appellants allege that the complainant and intervener have lost whatever rights they had in the waters of Sage Creek by abandonment and assigns Error XII for failure and refusal of the court to so find. Abandonment is like the statute of limitations and estoppel, and any other material defense, it must be pleaded in order to make it available by the defendants. Neither the petitioners, nor any of the defendants have pleaded abandonment; therefore it should not be considered in this controversy.

Morenhaut *vs.* Wilson, 52 Cal., 263;
 Johnson *vs.* McLaughlin, 1 Ariz., 502;
 Wulf *vs.* Manuel, 9 Mont., 286.

The statute of Wyoming provides that the failure to use water appropriated for a period of two years shall be construed as an abandonment, and it is evident that the petitioners seek to avail themselves of this provision of the Wyoming statute. But, the abandonment contemplated by the Wyoming statute is a *voluntary* abandonment and not a *forced* discontinuance of the user brought about by the taking of the water from one by the very parties seeking to defeat their rights because of such non-user.

To constitute an abandonment the acts of the party must be done voluntarily.

Landes *vs.* Perkins, 14 Mo., 238;
 Morenhaut *vs.* Wilson, 52 Cal., 263;
 Myers *vs.* Spooner, 55 Cal., 261;
 Wyman *vs.* Hurlburt, 40 Am. Dec., 465.

A failure to use water for the purpose for which it was appropriated will not constitute an abandonment, if, during the years in which it was not used there was not a sufficient quantity of water to supply the requisite amount for that purpose.

McCauley *vs.* McKeig, 8 Mont., 389.

The fact that the petitioners took the water from the respondents herein, so that they could not use it profitably, or at all, estops them from alleging or proving an abandonment on their part. Testimony was introduced in behalf of Morris and Howell showing that they were deprived of the use of water, and the resultant injury to their crops as bearing on the question of damages. From this testimony it is evident that there was no abandonment of their water rights by said respondents or either of them.

T. N. Howell testified that he raised splendid crops upon his place with the waters of Sage Creek in 1891, 1892, and 1893; that he put in a big crop in 1894, in fact, nearly all his place, but that the defendants took his water in June and dried it up. He put in big crops in 1895, 1896, and 1897, but each year the defendants, by their wrongful diversions, took his water and dried up his crops (Tr., p. 129). The witness says: "I sowed the biggest crop in 1897; I sowed seventy acres in 1897; that's the last crop I sowed. I said yesterday '96, but I was looking over my books and I find I tried to raise four crops instead of three and lost four crops in '94-'95-'6-'7." Tr., p. 52.)

He says: "It was no use to try it until I got water." He made demands upon those higher up the stream for the water, some had refused and some had promised to let it down to him. But he didn't abandon his water right. After his four unsuccessful attempts to raise crops and his fruitless personal appeals we find Howell instituting suits and appealing to the courts to establish his right to the waters of Sage Creek, and to enjoin the up-stream appropriators from interfering with his right. The case of Howell *vs.* Johnson et al. reported in

89 Fed., 556, shows that a demurrer was passed upon involving his right to the waters of Sage Creek on August 20, 1898. He evidently instituted the suit prior to that date, or immediately after his failure to raise a crop in 1897. He testified in this action that he commenced a suit against some of these defendants in the Circuit Court of the United States, for the District of Montana and got a decree against them. (Tr., p. 135.)

The decree referred to is found in the case of *In re Huntley*, 85 Fed., 889, 29 C. C. A., 468.

This was an appeal from an order adjudging the defendants guilty of contempt of court for the violation of the provisions of a decree rendered and entered in an action instituted by the respondent Howell herein, against a number of the appropriators of Sage Creek, in Montana. The decree being in favor of the said Howell. This makes two suits brought by Howell to enforce his water right. It is apparent that the respondent Howell, far from abandoning his right, has been very energetic and persistent in his efforts to assert it on more than one occasion in court. All the facts go to show that the respondent Howell was and ever has been very tenacious in holding on to his water right and in every way endeavoring to maintain, assert and preserve his rights instead of abandoning them.

VII.

On page 34 of petitioner's brief we find the heading "Origin of a Water Right—The Nation of the State?"

An effort is made through 40 pages of said brief to establish the claim that the Nation or the general Government is not the origin of the rights in question here, but that the rights depend entirely upon the laws of the States involved. It is contended from this that the State of Montana can dispose of the waters within its borders regardless of any rights theretofore acquired in Wyoming by the citizens thereof.

It is conceded in this petitioner's brief that the authorities are against their contention, yet still a great effort is made by them to sustain it.

We believe that we may be content to refer as heretofore to the opinion and decision of the learned judge who tried this case in the District Court. In pages 429 to 431 of said decision in 146 Fed., this question is most thoroughly discussed, and it

seems to us finally settled. A number of authorities are cited to support the said decision.

In the late case of Rickey Land & Cattle Company, Petitioners, *vs.* Miller & Lux, on certiorari to the Supreme Court of the United States, decided November 7, 1910, we find the same state of facts as in the case at bar. In that case the stream rose in the State of California, and the Rickey Land & Cattle Company as the successor of one Rickey, claimed the water in California, while Miller & Lux claimed prior rights upon the same stream in the State of Nevada. While this particular point seems not to have been made in the Supreme Court, it seems to us that the decision by that court implies the indorsement of the doctrine or principle claimed by Miller & Lux.

VIII.

On page 74 of petitioners' brief we find the heading, "The rights acquired in Wyoming were subordinate to the rights acquired in and on the Crow Indian Reservation in Montana."

Upon this point, we again wish to refer to the said opinion and decision of this case in the District Court. Under the head of "Riparian Rights" and at pages 431 to 433 of said decision in 146 Fed., we find a very clear and exhaustive discussion of this question. It seems to be entirely unnecessary to undertake to add anything thereto.

On behalf of the petitioners there is only one authority cited, which is that of *Winters vs. United States*, 207 U. S., 564. It does not seem to us that that decision at all upholds the contention made. From that case we quote as follows: "The case, as we view it, turns on the agreement of May, 1888, resulting in the creation of Fort Belknap Reservation. In the construction of this agreement there are certain elements to be considered that are prominent and significant." The court then goes on to discuss the elements of said agreement, and they are such as to make the case not at all applicable to the one at bar.

There is a very fine discussion and presentation of this point and claim in the brief of the complainant and intervener in the United States Circuit Court of Appeals, in pages 43 to 61

thereof. We presume that this brief is on file and a part of the record now before the Supreme Court, and we beg leave to refer to said brief and to said discussion therein, as it seems entirely unnecessary to us to quote those pages. We cite some of the authorities contained therein, however, as follows:

Long on Irrigation, Sec. 72;
 Howell *vs.* Johnson, 89 Fed., 556;
 Morris *vs.* Bean, 123 Fed., 618;
 Hoge *vs.* Eaton, 135 Fed., 411;
 Anderson *vs.* Bassman, 140 Fed., 14;
 Willey *vs.* Decker, 73 Pac., 210;
 Conant *vs.* Deet Creek, 66 Pac., 188;
 Pine *vs.* Mayor of New York, 112 Fed., 98;
 Holyoke Water Co. *vs.* Connecticut River Co., 20 Fed.,
 71;
 Rutz *vs.* City of St. Louis, 7 Fed., 438;
 4 Amer. Law Reg., 385;
 New Hampshire *vs.* Louisiana, 103 U. S., 76, 90;
 Rossmiller *vs.* State, 89 N. W., 839;
 Perkins County *vs.* Graff, 114 Fed., 441.

Error XIII is assigned because the learned judge did not find or rule that the waters of said creek during the irrigating season do not sink in the channel thereof and that said respondents would not have had water even if the said petitioners had not used the water of said creek. There is absolutely no testimony to warrant the court in so finding, but, to the contrary, the evidence is very conclusive that said respondents had abundant water until the diversion and use thereof by the petitioners. James F. Lampman, in response to Int. VIII, IX and X, testified that he had seen the water flow in sufficient quantities during the irrigating season sufficient to irrigate the ranches of said W. A. Morris and T. N. Howell before said waters were appropriated by the defendants (petitioners herein). (Tr., p. 93.)

James F. Howell (not the respondent) testified in response to Int. VIII, IX and X, That if the water was unmolested by the parties in Montana, it would flow in sufficient quantities during the irrigating season to thoroughly and permanently irrigate the ranches of the said W. A. Morris and T. N. Howell

and that prior to the appropriation of the water by parties in Montana the said W. A. Morris and T. N. Howell had sufficient water to thoroughly irrigate their ranches during the irrigating season, and that the said water did flow onto the said ranches in the years 1892-3 in sufficient quantities to thoroughly irrigate the same. (Tr., p. 95.)

Practically the same testimony is given by Owen G. Norton (Tr., p. 95) and by Richard B. Heritage (Tr., p. 98) and by Joseph M. Howell (Tr., p. 98).

The respondent T. N. Howell respectfully submits:

1. That the diversity of citizenship is clearly established, giving court jurisdiction.
2. That said respondent made and was granted an appropriation of water in the State of Wyoming, of which the citizens of another State cannot lawfully deprive him.
3. That he was never barred by the Statutes of Limitations, or by the statute of non-user.
4. That he has never been guilty of laches, but, on the contrary, exceedingly diligent in his effort to protect his rights.
5. That the sixth section of respondent's petition alleges the amount of water appropriated and the ninth section thereof definitely asserts the amount used and enjoyed.
6. That the amount of water awarded is certain, and determinate and measured by a well recognized mode of measurement and so found by the Master in Chancery to whom said cause was referred.

IX.

A few other points are presented in the brief of petitioners, but we do not deem them of sufficient importance to require any, particular discussion by us.

Especially as they are so fully covered by the opinion of the learned judge who tried the case in the Circuit Court.

146 Fed., 423, also Tr., p. 298, and affirmed by the opinion of the United States Circuit Court of Appeals, in the opinion written by the Hon. Judge DeHaven (Tr., p. 325).

On behalf of the (intervener below) respondent herein, T.

N. Howell, we respectfully submit that the decree should be affirmed.

ALEXANDER M. MCCOY,
WM. M. ELLISON,

Attorneys for Intervener and Respondent T. N. Howell.

WM. M. ELLISON,

Of Counsel.

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Opinion of the Court.

BEAN *v.* MORRIS.CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
NINTH CIRCUIT.

No. 122. Argued April 11, 12, 1911.—Decided May 29, 1911.

Where streams flow through more than one State, it will be presumed, in the absence of legislation on the subject, that each allows the same rights to be acquired from outside the State as could be acquired from within.

The doctrine of appropriation has always prevailed in that region of the United States which includes Wyoming and Montana; it was recognized by the United States before, and by those States since, they were admitted into the Union and the presumption is that the system has continued.

In this case an appropriation validly made under the laws of Wyoming is sustained as against riparian owners in Montana.

159 Fed. Rep. 651, affirmed.

THE facts are stated in the opinion.

Mr. T. J. Walsh, with whom *Mr. George W. Pierson* and *Mr. Cornelius B. Nolan* were on the brief, for petitioners.

Mr. William M. Ellison, with whom *Mr. Alexander M. McCoy* was on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the court.

This suit was brought by the respondent, Morris, to prevent the petitioners from so diverting the waters of Sage Creek in Montana as to interfere with an alleged prior right of Morris, by appropriation, to two hundred and fifty inches of such waters in Wyoming. Afterwards the other respondent, Howell, was allowed to intervene

and make a similar claim. Sage Creek is a small creek, not navigable, that joins the Stinking Water in Wyoming, the latter stream flowing into the Big Horn, which then flows back northerly into Montana again, and unites with the Yellowstone. The Circuit Court made a decree that Morris was entitled to 100 inches miner's measurement, of date April, 1887, and that, subject to Morris, Howell was entitled to one hundred and ten inches, of date August 1, 1890, both parties being prior in time and right to the petitioners. 146 Fed. Rep. 423. On appeal the findings of fact below were adopted and the decree of the Circuit Court affirmed by the Circuit Court of Appeals. 159 Fed. Rep. 651; 86 C. C. A. 519.

It was admitted at the argument that but for the fact that the prior appropriation was in one State, Wyoming, and the interference in another, Montana, the decree would be right, so far as the main and important question is concerned. It is true that some minor points were suggested, such as laches, abandonment, the statute of limitations, &c., but the findings of two courts have been against the petitioners upon all of these, and we see no reason for giving them further consideration. So we pass at once to the question of private water rights as between users in different States.

We know no reason to doubt, and we assume, that, subject to such rights as the lower State might be decided by this court to have, and to vested private rights, if any, protected by the Constitution, the State of Montana has full legislative power over Sage Creek while it flows within that State. *Kansas v. Colorado*, 206 U. S. 46, 93-95. Therefore, subject to the same qualifications, we assume that the concurrence of the laws of Montana with those of Wyoming is necessary to create easements, or such private rights and obligations as are in dispute, across their common boundary line. *Missouri v. Illinois*, 200 U. S. 496, 521. *Rickey Land & Cattle Co. v. Miller & Lux*,

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Opinion of the Court.

218 U. S. 258, 260. But with regard to such rights as came into question in the older States, we believe that it always was assumed, in the absence of legislation to the contrary, that the States were willing to ignore boundaries, and allowed the same rights to be acquired from outside the State that could be acquired from within. *Mannville Co. v. Worcester*, 138 Massachusetts, 89. *Thayer v. Brooks*, 17 Ohio, 489. *Slack v. Walcott*, 3 Mason, 508, 516. *Stillman v. White Rock Manuf. Co.*, 3 Woodb. & M. 538. *Rundle v. Delaware & Raritan Canal Co.*, 1 Wall. Jr. 275, 14 How. 80. *Foot v. Edwards*, 3 Blatchf. 310. See *Wooster v. Great Falls Manuf. Co.*, 39 Maine, 246, 253. *Armendiaz v. Stillman*, 54 Texas, 623; *State v. Lord*, 16 N. H. 357. *Howard v. Ingersoll*, 17 Alabama, 780, 793. There is even stronger reason for the same assumption here. Montana cannot be presumed to be intent on suicide, and there are as many if not more cases in which it would lose as there are in which it would gain, if it invoked a trial of strength with its neighbors. In this very instance, as has been said, the Big Horn, after it has received the waters of Sage Creek, flows back into that State. But this is the least consideration. The doctrine of appropriation has prevailed in these regions probably from the first moment that they knew of any law, and has continued since they became territory of the United States. It was recognized by the statutes of the United States, while Montana and Wyoming were such territory, Rev. Stat., §§ 2339, 2340, p. 429, Act of March 3, 1877, c. 107, 19 Stat. 377, and is recognized by both States now. Before the state lines were drawn of course the principle prevailed between the lands that were destined to be thus artificially divided. Indeed, Morris had made his appropriation before either State was admitted to the Union. The only reasonable presumption is that the States upon their incorporation continued the system that had prevailed theretofore, and made no changes other than those necessarily implied or

Syllabus.

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expressed. See *Willey v. Decker*, 11 Wyoming, 496; *Smith v. Denniff*, 24 Montana, 20.

It follows from what we have said that it is unnecessary to consider what limits there may be to the powers of an upper State, if it should seek to do all that it could. The grounds upon which such limits would stand are referred to in *Rickey Land & Cattle Co. v. Miller & Lux*, 218 U. S. 258, 261. So it is unnecessary to consider whether Morris is not protected by the Constitution; for it seems superfluous to fall back upon the citadel until some attack drives him to that retreat. Other matters adverted to in argument, so far as not disposed of by what we have said, have been dealt with sufficiently in two courts. It is enough here to say that we are satisfied with their discussion and confine our own to the only matter that warranted a certiorari or suggested questions that might be grave.

Decree affirmed.